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## Stricter Products Liability

Nicolas P. Terry

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# MISSOURI LAW REVIEW

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## STRICTER PRODUCTS LIABILITY\*

Nicolas P. Terry\*\*

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\* Copyright 1987 Nicolas P. Terry. This article, with a few noted exceptions, concentrates on aspects of Missouri products liability law that were left unscathed by H.B. 700, 84th Gen. Ass., 1st Reg. Sess. (1987).

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## I. INTRODUCTION

Commencing with its 1983 decision in *Virginia D. v. Madesco Investment Corp.*,<sup>1</sup> a pro-plaintiff bias is thought to have overtaken the Missouri Supreme Court.<sup>2</sup> For example, subsequent supreme court cases have introduced

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1. 648 S.W.2d 881 (Mo. 1983) (en banc) (jury could find that evidence of past, nonviolent, criminal incidents was sufficient to impose duty upon hotel to take reasonable precautions to guard against sexual assault on guest).

2. Different people no doubt will trace this perceived swing from different dates. For example, in *Bass v. Nooney*, 646 S.W.2d 765 (Mo. 1983) (en banc), the Missouri Supreme Court abandoned the impact rule which limited recovery for emotional distress and permitted plaintiff to recover provided that defendant should have realized that its conduct could unreasonably cause distress and that the emotional distress is medically diagnosable. This case was submitted to the court prior to the appointment of Judges Blackmar and Billings. However, the choice of *Virginia D.* seems appropriate. Subsequent Missouri Supreme Court opinions themselves have referred back, often scathingly, to the *Virginia D.* case. See, e.g., *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237, 246 (Mo. 1983) (en banc) (Donnelly, J., dissenting); *Fowler v. Park Corp.*, 673 S.W.2d 749, 761 (Mo. 1984) (en banc) (Donnelly, J., dissenting); *Jackson v. Ray Kruse Constr. Co.*, 708 S.W.2d 664, 671 (Mo. 1986) (en banc) (Donnelly, J., dissenting); *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 497 n.1 (Mo. 1986) (en banc) (Donnelly, J., dissenting). Also, and of considerable importance, *Virginia D.* was the first personal injury torts opinion written by the then newly appointed member of the court, Judge Charles B. Blackmar.

Note, incidentally but importantly in the context of the subject matter of this article, that Judge Donnelly was the author of the court's opinion in Missouri's first modern products liability case, *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969). More recent opinions of the majority have been penned by Judge Blackmar and Judge Billings. However, when the issue is whether to extend products liability law into uncharted waters, very different allegiances can develop. See, e.g., *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901 (Mo. 1986) (en banc) (Donnelly, J., for the majority with Welliver and Blackmar, J.J., concurring and Blackmar, J., concurring in the separate concurring opinion of Welliver, J.; Billings and Rendlen, J.J., concurring in dissenting opinion of Higgins, C.J.).

an extended notion of vicarious liability<sup>3</sup> and, taking on where *Virginia D.* left off, have imposed still further burdens upon property owners.<sup>4</sup>

Recent products liability decisions of the Missouri Supreme Court suggest that this trend, detectable in the court's general torts decisions,<sup>5</sup> may have found application in the law controlling manufacturer responsibility for defective products.

Persistent dissenters from these torts cases also have distanced themselves from recent and important developments of products liability doctrine.<sup>6</sup> These dissenting voices have accused a majority on the supreme court of instituting a system of absolute liability. Judge Donnelly, one of those voices, has stated that: "In early 1983 it was apparent that *fault* was targeted for elimination as a component in the tort equation. This is unfortunate. In my view, the Court distorts the judicial process when it gives to one what belongs to another."<sup>7</sup> Judge Donnelly has gone so far as to suggest in the face of this assault that the core doctrine of strict products liability should be abrogated.<sup>8</sup>

3. *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo. 1983) (en banc) (freight broker and carrier vicariously liable for negligence of truck driver despite fact that the only link between the two was a leased sign indicating an agency relationship, present on the truck, the removal of the sign having been forgotten).

4. *Jackson v. Ray Kruse Constr. Co.*, 708 S.W.2d 664 (Mo. 1986) (negligent failure of apartment complex to install speed bumps was the proximate cause of injuries sustained by child hit by bicycle in parking lot). See also *Frank v. Environmental Sanitation Management*, 687 S.W.2d 876 (Mo. 1985).

5. The debate in the Missouri Supreme Court has not always been in cases that have extended plaintiff recovery. For example, in *State ex rel. St. Louis Housing Auth. v. Gaertner*, 695 S.W.2d 460 (Mo. 1985) (en banc), Judge Donnelly's majority opinion held that a housing authority was shielded from tort liability by the doctrine of sovereign immunity. This solicited the response from Judge Blackmar (Rendlen, J., and Lowenstein, S.J., concurring) that: "The principal opinion, through a surfeit of conceptualistic analysis, unnecessarily deprives the plaintiffs in the trial court of insurance coverage which the relator undertook to furnish." *Id.* at 463 (Blackmer, J. dissenting).

6. In both *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434 (Mo. 1984) (en banc), and *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371 (Mo. 1986) (en banc), Judges Welliver and Donnelly dissented and filed separate opinions.

7. *Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491, 497 (Mo. 1986) (en banc) (footnote omitted).

8. *Barnes v. Tools and Mach. Builders*, 715 S.W.2d 518, 524 (Mo. 1986) (en banc) (Donnelly, J., dissenting).

I think it must be said now that *Keener* [*Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969), introducing strict products liability into Missouri law] is a failed attempt at fairness. Given its ultimate distortion by the holding in *Lippard* [discussed *infra* text<sup>a</sup> accompanying note 167], *Keener* should be expressly overruled.

*Id.*

Judge Welliver, also a frequent dissenter in recent products liability cases, does not appear to be quite so disenchanted with the basics of the strict liability

Yet at the same time, the Missouri Supreme Court has clouded its message<sup>9</sup> somewhat by refusing to increase product manufacturer liability in other important areas.<sup>10</sup> It appears that there is a narrow majority on the supreme court that favors permitting most of what *it* considers mainstream products liability claims to go to the jury with a minimum of judicial control.<sup>11</sup> However, that majority disintegrates when there is a proposal for what some members of the court would consider to be a change in, rather than a mere application of, accepted principles.<sup>12</sup>

The purpose of this article is to detail the recent developments in Missouri's law of products liability and to highlight any detectible trends.<sup>13</sup> Specifically, investigation will be made of the allegations that the Missouri Supreme Court is displaying a pronounced pro-plaintiff shift.<sup>14</sup> Clearly, the existence

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system. *See* Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo. 1986) (Welliver, J., concurring):

The architects of [strict liability] . . . recognized the need to allow injured consumers or remote parties the ability to sue suppliers, sellers or manufacturers absent the technical requirements of privity in a contract action or without the need to prove negligence in a tort action. The rationale for such a doctrine was that consumers and remote parties are not on an equal footing with the manufacturer or seller to bargain effectively for the allocation of risk.

*Id.*

9. Missouri is not alone in sending out the occasional mixed message. *See, e.g.,* Levy & Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497, 497-98 (1979).

10. *See, e.g.,* Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (en banc) (Missouri will not recognize "market share" exception to plaintiff's burden of identifying product manufacturer); Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 703 S.W.2d 901 (Mo. 1986) (en banc) (strict liability does not apply where the only harm is to the product itself, abandoning previous ["violent occurrence" rule]); Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986) (successor corporation not liable on the so-called "product-line" theory).

11. And, possibly, a minimum of defense evidence as to the safety of the product.

12. *See* cases cited *supra* notes 2 and 10. Specifically, consider the reference to doctrine that "substantially alters the existing rights and liabilities of the litigants." Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (en banc).

13. This article is restricted in its scope to an examination of those issues that have arisen because of Missouri's adoption of RESTATEMENT (SECOND) OF TORTS § 402A (1965). It does not deal with allegations brought under warranty or negligence theories. Neither does it address the peripheral causes of action to be found in RESTATEMENT (SECOND) OF TORTS § 402B (1965), *Heitman v. Concrete Mach. Co.*, Order No. 82-2008C(i) (Mo. Ct. App. Nov. 8, 1983) (on file with the Missouri Law Review) (section 402B not recognized as part of the law of Missouri), nor the somewhat idiosyncratic negligence cause of action recognized in Missouri for furnishing a dangerous instrumentality. *See* MO. APPROVED JURY INSTRUCTIONS 25.06 (1981) [hereinafter MAI].

14. The torts system, generally, is being subjected to unprecedented criticism.

of any such shift will be of profound importance at the time when Missouri is still feeling the effects of the so-called insurance "crisis"<sup>15</sup> and when its courts will be interpreting newly introduced products liability "reform" legislation.<sup>16</sup>

## II. AN ABRIDGED HISTORY OF LAW AND POLICY

In 1969, the Missouri Supreme Court in *Keener v. Dayton Electric Mfg. Co.*, moved Missouri products law into the mainstream postulating that, *inter alia*, "[i]t is essential now that the Bench and Bar of Missouri be given some sense of direction in products liability cases."<sup>17</sup> It is ironic that the supreme court should have ignored its avowed purpose for fifteen years following that opinion.<sup>18</sup>

Notwithstanding the period of neglect that would follow, *Keener* placed Missouri in alignment with the majority of jurisdictions in adopting the formulation of liability to be found in the Second Restatement of Torts, Section 402A.<sup>19</sup> In short, whether alleging a manufacturing (quality control)

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See O'Connell, *Bhopal, the Good Lawyer, and the American Law School: A Torts (and Insurance) Professor's Perspective*, 36 J. LEGAL EDUC. 311, 311 (1986):

[O]ur personal injury tort system is a very sorry one - bloated, arbitrary, and dilatory. [I]t seems to me to fail abysmally at every level on which it operates and at every goal at which it aims. As to its achieving deterrence, we are told that sanctions must be swift and certain - two things tort law is certainly *not*. As to providing compensation, many plaintiffs are not paid or paid much less than their loss, some are paid much more than their loss, and any payment is long delayed. As to efficiency, the system entails huge transaction costs in insurance overhead and legal fees for plaintiff and defendant alike. The result is both bad law and a bad insurance system.

*Id.* (citation omitted).

15. If, indeed, any crisis existed. See, e.g., Terry, *The Malpractice Crisis in the United States: A Dispatch from the Trenches*, 2 PROF. NEGL. 145 (1986).

16. See generally H.B. 700, 84th Gen. Ass., 1st Reg. Sess. (1987).

17. 445 S.W.2d 362, 364 (Mo. 1969). Previously, the supreme court had approved a strict liability system based on implied warranty doctrine. See *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963) (en banc).

18. For a brief history of Missouri products liability law, see *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 375-78 (Mo. 1986) (en banc).

19. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT] states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

defect,<sup>20</sup> a design defect<sup>21</sup> or a marketing (warning) defect,<sup>22</sup> the plaintiff in a Missouri products liability action must prove that the product in question was "unreasonably dangerous"<sup>23</sup> for its reasonably anticipated (or foreseeable) use.<sup>24</sup> Furthermore, and in keeping with most jurisdictions, the Missouri courts have not been reticent in extending the reach of strict liability to most of the parties involved in the chain of distribution.<sup>25</sup>

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

20. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

21. Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. 1977); Duke v. Gulf & W. Mfg. Co., 660 S.W.2d 404, 411-12 (Mo. Ct. App. 1983); cf. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 33(3)(a) (1987) (treating manufacturing and design defects as a single type of allegation).

22. Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984); Duke, 660 S.W.2d 404 (Mo. Ct. App. 1983); see also H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 33(b) (1987).

23. In manufacturing and design defect cases, plaintiff must prove that the product was in a "defective condition unreasonably dangerous." See generally MAI 25.04, Strict Liability - Product Defect:

Your verdict must be for plaintiff if you believe:

First, the defendant sold the (*describe product*) in the course of defendant's business, and

Second, the (*describe product*) was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the (*describe product*) was used in a manner reasonably anticipated, and

Fourth, plaintiff was damaged as a direct result of such defective condition as existed when the (*describe product*) was sold.

However, in a marketing defect case, the defective condition requirement is omitted. See MAI 25.05, Strict Liability— Failure to Warn:

Your verdict must be for plaintiff if you believe:

First, defendant sold the (*describe product*) in the course of defendant's business, and

Second, the (*describe product*) was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and

Third, defendant did not give an adequate warning of the danger, and

Fourth, the product was used in a manner reasonably anticipated, and

Fifth, plaintiff was damaged as a direct result of the (*describe product*) being sold without an adequate warning.

For a discussion of whether Missouri has adopted a bifurcated test, see *infra*, text accompanying note 89.

24. See, e.g., Klein v. General Elec. Co., 714 S.W.2d 896, 900 (Mo. Ct. App. 1986).

25. See, e.g., Williams v. Ford Motor Co., 494 S.W.2d 678 (Mo. Ct. App. 1973); Gabbard v. Stephenson's Orchard, 565 S.W.2d 753 (Mo. Ct. App. 1978); cf. Wright v. Newman, 735 F.2d 1073 (8th Cir. 1984); Racer v. Utterman, 629 S.W.2d 387 (Mo. Ct. App. 1981); Chubb Group of Ins. Co. v. C.F. Murphy & Assocs., Inc.,

At the root of the doctrinal and policy difficulties experienced by the courts, including Missouri's, are the seldom appreciated limitations of product liability's doctrinal base,<sup>26</sup> the Restatement (Second) of Torts, Section 402A.<sup>27</sup> Arguably, section 402A was designed to deal only with manufacturing defects, not design or warning cases.<sup>28</sup> Its founding fathers probably had in mind no more than a streamlining and consolidation of existing doctrinal approaches such as negligence plus *res ipsa loquitur*,<sup>29</sup> and warranty minus privity<sup>30</sup> theories. The purpose was not to bring in any dramatic change, but

656 S.W.2d 766 (Mo. Ct. App. 1983); *Hunt v. Guarantee Elec. Co.*, 667 S.W.2d 9 (Mo. Ct. App. 1984); *Gunderson v. Sani-Kem Corp.*, 674 S.W.2d 665 (Mo. Ct. App. 1984); *Commercial Distrib. Center v. St. Regis Paper Co.*, 689 S.W.2d 664 (Mo. Ct. App. 1985).

H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 33(1) (1987) provides in its definition of a products liability action for no differentiation between defendants "wherever situated in the stream of commerce." However, section 34 provides that:

1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.
2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim.

*Id.* Section 34(3)-(7) provides for procedural devices to reflect this new substantive rule. *Id.* § 34(3)-(7). The purpose of this new rule is to reduce the litigation costs of retailers (or other mere conduits) who routinely are joined as co-defendants in products liability cases brought against manufacturers. Because of the provisions of section 34(2), (4)-(7) plaintiffs should suffer no adverse effects with regard to their damage recovery. Nevertheless, this provision underestimates the role of such sellers in modern marketing. First, in many industries, sellers, particularly retailers, play an important role as the marketing arms of manufacturers. In such cases considerable difficulty will be experienced by the courts in determining whether such a seller's alleged liability is based "solely on his status as a seller." In this regard, section 34(4) invites plaintiffs to indulge in a fishing expedition to attempt to discover some nonseller basis for liability. Second, the new provision ignores the important accident avoidance role that even "mere" sellers may have because of their superior bargaining position with the manufacturer when compared to the consumer. Third, such sellers are already in a position to negotiate with manufacturers for indemnification for their litigation costs and liability exposure.

26. *Cf. Little, Rationalization of the Law of Product Liability*, 36 U. FLA. L. REV. 1 (1984) (tracing the problems back into the nineteenth century).

27. RESTATEMENT, *supra*, note 19.

28. Not surprisingly, it is only the first type of case that seems to escape the difficulties addressed in this article. This is because, in a manufacturing defect case, there is little difficulty in determining the degree of quality that the product in question *should* have possessed. A simple comparison with products from the same production line that do not contain such a defect provides an unimpeachable standard of reference.

29. *See, e.g., Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

30. *See Prosser, The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960);



to reduce the plaintiff's administrative costs in pressing her case.<sup>31</sup> If the change in doctrine had the effect of redistributing a few more of those product-related risks, that would not be out of keeping with the rise of consumer protectionism at the time that section 402A was being drafted.

Yet the true distributional role of section 402A was never made clear.<sup>32</sup> Since its inception at least two radically contrasting views have been maintainable. In the first place, section 402A may be read as having introduced a species of "super-negligence." This type of products liability system would work much like any other modern personal injury tort, aside from a "few" modifications of the general tort rules and a "few" restrictions going to evidentiary matters. If this really was the case, then the courts have been needlessly cryptic in their analysis of products cases. Furthermore, if modern products liability is merely this "super-negligence" system, then perhaps its administrators, the courts, mistakenly are using it to redistribute too many risks.

A second possible interpretation of section 402A is that it constitutes a reasonably pure attempt by the judiciary to shift nearly all product-related risks away from those in the chain of consumption.<sup>33</sup> If this is the case, neither the insurance or manufacturing industries nor their defense counsel have ever come to terms with this purpose of modern products liability law. Further, the courts have failed to come up with a doctrinal statement that expresses this intent<sup>34</sup> or one which will achieve such redistribution with dramatically lowered administrative costs. Finally, as a society, we do not

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Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); see also Comment, *Implied Warranties - The Privy Rule and Strict Liability - The Non-Food Cases*, 27 MO. L. REV. 194 (1962).

31. By reducing the number of issues requiring proof, rather than requiring plaintiff to establish a large number of doctrinal requirements, but subjecting their proof to a burden shift with a *res ipsa loquitur* instruction, strict liability actually reduces the number of elements that need to be proven. See, e.g., *Blevins v. Cushman Motors*, 551 S.W.2d 602, 607 (Mo. 1977) (en banc) (stating that, "[o]ur acceptance of strict liability in tort in defective design cases 'eliminates proof as to violation of the standard of reasonable care' with regard to the adoption of a particular product design") (citation omitted). Compare for example the plaintiff's burden in a negligence case. See, e.g., *Bean v. Ross Mfg.*, 344 S.W.2d 18 (Mo. 1961).

32. See Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1187 (1976).

33. See, e.g., *Frank v. Environmental Sanitation Management*, 687 S.W.2d 876, 885 (Mo. 1985) (Blackmar, J., concurring). For an example of the difficulties inherent in this approach, see *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir.), cert. denied, 450 U.S. 959 (1981). See also *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 114 (La. 1986) (possibly describing a more radical form of strict liability to be applied to redistribute the risks associated with certain products).

34. This issue displays particularly egregious examples of judicial doubletalk. Consider, for example, two passages from Judge Billings' generally exemplary majority opinion in *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371 (Mo. 1986) (en banc). Of greatest importance was his provision of a modern focus for Missouri's

seem to have faced up to the problem of whether there should be some *quid pro quo* for this type of risk redistribution.<sup>35</sup>

For Missouri, like most other 402A states, the Restatement formulation has remained the holy grail of its products liability law. Thus, the disposition of every products issue apparently must commence with an incantation to the effect that:

Missouri products liability has its origin in *Keener v. Dayton Manufacturing Co., Inc.* This case followed the lead of Restatement (Second) of Torts, section 402A, which states emphatically that liability may be found if a person is injured by a defective product unreasonably dangerous, even though the manufacturer or supplier has taken all possible precautions.<sup>36</sup>

Unfortunately, neither such recitations nor section 402A have told us very much about the nature of this form of liability. Functionally, we can presume that the drafters had determined that negligence-based liability either was not redistributing enough product related risks<sup>37</sup> or that any such redis-

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products liability law stating:

The imposition of strict tort liability is justified on the grounds that the manufacturer or seller is almost always better equipped than the consumer to endure the economic consequences of accidents caused by defective products. Everything in the marketplace has a price, including profits. Economic responsibility for the debilitating consequences of injuries caused by defective products is but one of the many associated with doing business and earning profits. All things considered, we find no unfairness in holding manufacturers and sellers economically and socially responsible for injuries *actually* caused by the products they place for profit in the stream of commerce.

*Id.* at 383. However, earlier in his opinion, Judge Billings had stated that, "the doctrine of strict tort liability is not, nor was it ever intended to be, an enveloping net of absolute liability." *Id.* at 375. The problem is that many would define an absolute liability system as one based solely on causation; a system which Judge Billings' later statement appeared to delineate.

35. For example, taking more of a worker's compensation or no-fault insurance oriented approach to the amount of damages recoverable under such a system.

36. *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 492 (Mo. 1986) (en banc) (citation omitted).

37. Such may be gauged from the court's opinion in *Keener v. Dayton Mfg. Co., Inc.*, 445 S.W.2d 362 (Mo. 1969), relying as it did on the type of risk redistribution adopted in California. *Id.* at 364; see also *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371 (Mo. 1986) (en banc):

Strict tort liability recognizes that in today's world consumers can do little to protect themselves from the risk of serious injury caused by defects in the products they purchase. And, the more complex the product, the less opportunity there is for the consumer to guard against deleterious defects. To this extent, the consumer must rely upon the integrity and competency of the business community. History, however, has taught us that negligence liability alone provides an inadequate tort remedy for injured consumers and does little to stimulate greater care in the manufacturing process. Strict tort liability is rooted in these realities.

*Id.* at 383.

tribution was costing too much in terms of plaintiffs' administrative or information costs.

Section 402A, itself, yields some useful, albeit basic, information when it states that liability applies even though "the seller has exercised all possible care in the preparation and sale of his product."<sup>38</sup> We know, therefore, that we will be redistributing more risks than under the preceeding negligence-based system.<sup>39</sup> Further, the general labelling of this new type of liability as "strict" suggests that it is not an absolute liability system, *i.e.*, liability of a product supplier based solely on causation.<sup>40</sup> Thus, it has been stated that, "[a]lthough the doctrine of strict liability in tort imposes liability without proof of negligence, the law does not impose liability for every injury caused by a product. Liability exists only if the product was in a 'defective condition unreasonably dangerous.'"<sup>41</sup>

A stronger conceptual and doctrinal base has been suggested for at least two reasons. First, to distinguish this new form of liability from the negligence based system that preceded it. Second, to provide some formula for distinguishing those product-related risks that the court does wish to redistribute and those that it does not.<sup>42</sup> Overall, however, surprisingly little about these issues is revealed from the system's doctrinal underpinnings.<sup>43</sup>

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38. RESTATEMENT, *supra* note 19, § 402A(2)(a).

39. We also learn something as to the "quality" of our redistribution system; it is one based upon tort not contract. See *Keener*, 445 S.W.2d at 364 ("The main advantage to Missouri courts in fully adopting the *Restatement* theory could be release from the shackles of warranty language . . . ." (quoting Krauskopf, *Products Liability*, 32 Mo. L. Rev. 459, 469 (1967))).

40. Consider for example the workers' compensation systems that we know today. In essence, such statutes circumvent the tort redistribution system and many of its failings by limiting the employer liability and employee recovery for work-related injuries. The employer is held to a strict liability standard for accidental injuries arising out of and during the course of employment. As a *quid pro quo* for such heightened liability, the employee can no longer recover in tort for such injuries. Compensation generally is limited to medical treatment costs and lost earning capacity.

41. See, e.g., *Dart v. Wiebe Mfg.*, 147 Ariz. 242, \_\_\_, 709 P.2d 876, 878 (1985) (citation omitted); *O'Brien v. Muskin Corp.*, 94 N.J. 169, \_\_\_, 463 A.2d 298, 303 (1983).

42. For a dramatization of this issue, see Crowe, *Products Liability Law-A Brief Reflection on Legal Analysis and an Aspect of the Concept of Defect*, 34 MERCER L. REV. 955, 957-61 (1983). For an effective summary of the various approaches to distinguishing those risks to be redistributed that have been proposed and/or adopted, see Vandall, "Design Defect" in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO STATE L.J. 61, 72-79 (1982).

43. By way of comparison, consider RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1977) providing that:

§ 519. *General Principle*

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from

Courts and commentators have responded by seeking to fill this vacuum with reverse-engineered doctrine.<sup>44</sup> “[D]efective condition unreasonably dan-

the activity, although he has exercised the utmost care to prevent the harm.  
(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

§ 520. *Abnormally Dangerous Activities*

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

*Id.* §§ 519-20.

Sections 519-20 espouse a very different judicial philosophy. Whereas section 519 is as vague as components of section 402A, section 520 provides both limiting factors and criteria to assist the doctrine's application. For Missouri cases applying these principles, see *Summers v. Tavern Rock Sand Co.*, 315 S.W.2d 201 (Mo. 1958); *Donnell v. Vigus Quarries*, 526 S.W.2d 314 (Mo. Ct. App. 1975) (strict liability for blasting damage).

44. Unlike the case with section 402A, the judiciary was supplied with sufficient means to exert continued and tight doctrinal control over the types of cases that fall under RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1977). See, § 520 comment f, defining “[a]bnormally dangerous,”

For an activity to be abnormally dangerous, not only must it create a danger of physical harm to others but the danger must be an abnormal one. In general, abnormal dangers arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances. In determining whether the danger is abnormal, the factors listed in clauses (a) to (f) of this Section [*supra* note 43] are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and appropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

*Id.*

It should be remembered that there was initial judicial antipathy toward the antecedents of sections 519-20, *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), *aff'g*, *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866). See *Brown v. Collins*, 53 N.H. 442 (1873).

gerous,"<sup>45</sup> the only phrase in the Restatement formulation which did not have an immediately obvious natural meaning, was seized upon as the best available Trojan Horse which could carry some structured system into the new citadel of strict liability.

The most popular method of distinguishing between negligence and strict products liability is the "foresight of risk" approach, whereby that component of negligent products liability<sup>46</sup> is summarily deleted from the strict liability formulation.<sup>47</sup> In *Blevins v. Cushman Motors*, the Supreme Court of Missouri stated:

[T]here exists an important distinction between [negligence and strict liability]. In negligence cases the duty owed is based on the foreseeable "or reasonable anticipation that harm or injury is a likely result of acts or omissions." On the other hand, strict liability in tort is based in part on the foreseeable or "reasonably anticipated" use of the product, rather than on the reasonably anticipated *harm* the product may cause.<sup>48</sup>

Subsequent Missouri cases have endorsed this choice of doctrinal distinction.<sup>49</sup>

Perhaps such antipathy or, even, hostility has been channelled into a degree of conservatism in the application of the modern doctrine. See generally Comment, *The Rylands v. Fletcher Doctrine and Its Standing in Missouri*, 18 Mo. L. REV. 53 (1953).

To further emphasize the role of the judiciary in keeping the doctrinal reins on the doctrine, consider, RESTATEMENT (SECOND) OF TORTS § 520 comment l (1977), stating that it is the function of the court and not the jury to determine the necessity for the imposition of strict liability.

45. RESTATEMENT, *supra* note 19, § 402A(1).

46. See RESTATEMENT, *supra* note 19, § 395.

47. See *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 491-94, 525 P.2d 1033, 1036-37 (1974) (en banc). See generally Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973). Arguably, this approach was considered to have more important practical rather than theoretical implications until the New Jersey Supreme Court applied this approach to marketing cases and thus triggered the "state of the art" debate. See *infra* text accompanying note 143.

48. 551 S.W.2d 602, 607-08 (Mo. 1977) (en banc) (citation omitted).

49. See *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 375 n.4 (Mo. 1986) (en banc) ("[f]oreseeability . . . is a determinant of use; it is not a determinant of harm"); *Aronson's Men's Stores v. Potter Elec. Signal*, 632 S.W.2d 472 (Mo. 1982) (en banc); *Grady v. American Optical Corp.*, 702 S.W.2d 911, 917 (Mo. Ct. App. 1985); *Chubb Group of Ins. Cos. v. C.F. Murphy & Assocs.*, 656 S.W.2d 766, 775 (Mo. Ct. App. 1983) (recognizing that both strict and negligence liability imposed duties not to manufacture so as to be unreasonably dangerous; suggesting, therefore, that the difference must lie elsewhere); *Keller v. International Harvester Corp.*, 648 S.W.2d 584, 587 (Mo. Ct. App. 1983). See generally *White v. General Chem. Co.*, 136 S.W.2d 345, 350 (Mo. Ct. App. 1940) (in negligence-based products liability action plaintiff has burden of showing that the defendant knew or should have known of the risk inherent in the product); *Hull v. Gillioz*, 344 Mo. 1227, 130 S.W.2d 623 (Mo. 1939).

Additionally, the Missouri courts have adopted another significant indicia of a strict liability system by shifting their judgmental emphasis from the manufacturer to its product.<sup>50</sup> This approach is designed to replace the negligence "reasonable manufacturer" test with more objective criteria. In their extreme manifestations these approaches lead to the exclusion of certain evidence and initiate the so-called "state of the art" debate.<sup>51</sup>

Most of the observed battles in modern products litigation continue to confront and occasionally address these fundamental issues, albeit under the guise of some manipulatable piece of judicial labelling.<sup>52</sup> Should a risk-benefit analysis or a consumer expectations test be utilized?<sup>53</sup> What degree of product misuse is foreseeable? Should a defendant be permitted to introduce state of the art evidence? When assessing the "unreasonableness" of the danger of a product should a hindsight or a foresight test be applied?

Given these and other dilemmas faced by contemporary products law, it is tempting to reach back to the words of Judge Molloy penned in 1967:

The grand simplicity of the new doctrine—its sweeping aside of the concept of liability through fault—is its most dangerous aspect. The all-inclusive ring of "strict liability," will cause an overextension . . . of what is conceived by its progenitors to be a limited concept. Unlike its predecessor-dctrine of liability through "fault," which in the very statement of the principle suggests that the shifting of loss is to be the exception rather than the rule, the innuendos of the new verbiage are pervasive.<sup>54</sup>

The flaw inherent in this otherwise perceptive comment was, and indeed is, that this criticism may also be levelled at the negligence system. Negligence law is similarly open ended. This state of affairs became inevitable once the courts abandoned a standard of care that, either directly<sup>55</sup> or indirectly,<sup>56</sup> judged the defendant by a subjective standard.

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50. See, e.g., *Blevins v. Cushman Motors*, 551 S.W.2d 602, 608 (Mo. 1977) (en banc); *Racer v. Utterman*, 629 S.W.2d 387, 395 (Mo. Ct. App. 1981), *cert. denied and appeal dismissed sub nom.* *Racer v. Johnson & Johnson*, 459 U.S. 803 (1982).

51. See, e.g., *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949, 953 (8th Cir. 1982); *Hoppe v. Midwest Conveyor Co.*, 485 F.2d 1196, 1202 (8th Cir. 1973); *Keller v. International Harvester Corp.*, 648 S.W.2d 584, 588 (Mo. Ct. App. 1983). See also *infra* text accompanying note 141.

52. See generally Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

53. For the prevailing attitudes prior to *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969) (en banc), see Krauskopf, *Products Liability*, 33 Mo. L. REV. 24, 33-36 (1968).

54. *Bailey v. Montgomery Ward & Co.*, 6 Ariz. App. 213, 224, 431 P.2d 108, 119 (1967) (Molloy, J., dissenting).

55. See *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837) (refusal to permit totally subjective standard to be utilized in law of negligence).

56. See *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (denying any conclusive role for customary practices in setting the legal standard of care for an industry).

## THE BASES OF STRICT LIABILITY: THEORY AND PRACTICE

Missouri's development of products liability law in the years that followed *Keener*<sup>57</sup> followed a somewhat conservative course, heavily dependent on section 402A. As such it was considered that Missouri preferred the conventional route to determining whether a product was "unreasonably dangerous;" the Restatement's so-called "consumer expectations" (or consumer contemplation) test.<sup>58</sup> However, absent any firm statement to this effect by the supreme court,<sup>59</sup> the Western District Court of Appeals, has been somewhat more adventurous.<sup>60</sup>

The conventional "consumer expectations"<sup>61</sup> approach is seriously flawed.<sup>62</sup> In the first place, courts will not apply it literally and ask the jury (consumers) what *their* expectations would have been.<sup>63</sup> Secondly, the "consumer" apparently used in this test either is nonidentifiable or the subject of judicial manipulation.<sup>64</sup> The explanation appears to be that despite the

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57. 445 S.W.2d 362.

58. In fact, as noted by the Missouri Supreme Court in *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 377 n.10 (Mo. 1986) (en banc), only a "handful" of cases have mentioned the test. See, e.g., *St. Louis-S.F. Ry. v. Armco Steel Corp.*, 359 F. Supp. 760, 762 (E.D. Mo. 1973), *aff'd in part*, 490 F.2d 367 (8th Cir. 1974); *Uder v. Missouri Farmers Ass'n*, 668 S.W.2d 82, 93 (Mo. Ct. App. 1983); *Racer v. Utterman*, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981), *cert. denied and appeal dismissed sub nom. Racer v. Johnson & Johnson*, 459 U.S. 803 (1982); *Brawner v. Liberty Indus.*, 573 S.W.2d 376 (Mo. Ct. App. 1978); see also *Hylton v. John Deere Co.*, 802 F.2d 1011, 1015 (8th Cir. 1986).

59. The closest that the Missouri Supreme Court came to adopting a position was in *Aronson's Men's Stores v. Potter Elec. Signal Co.*, 632 S.W.2d 472, 474 (Mo. 1982) (en banc).

60. See *infra* text accompanying notes 69-70.

61. An apparently close relative is the "manufacturer's expectations" test. See *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759-60 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973); *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 494, 525 P.2d 1033, 1037 (1974) (en banc). Courts and commentators insist that this test should be interpreted as a variant on the "consumer expectations" formulation. However, as with the "risk-utility" test, discussed *infra* text beginning at note 68, the jury is asked, "if you were in the shoes of a reasonable manufacturer and there was a cost-effective alternative design to the one in question, would you have considered this product to be unreasonably dangerous?" Furthermore, a consumer's expectations will only equate to a manufacturer's in cases involving manufacturing defects. Cf. *Racer v. Utterman*, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981), *cert. denied and appeal dismissed sub nom. Racer v. Johnson & Johnson*, 459 U.S. 803 (1982).

62. See generally *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 376 (Mo. 1986) (en banc).

63. See, e.g., *Heaton v. Ford Motor Co.*, 248 Or. 467, 472, 435 P.2d 806, 809 (1967).

64. The paradigm case is *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975) (two year old child was injured when he fell into a swimming pool at his grandparents' home). RESTATEMENT, *supra*

adoption of this apparently "user friendly" approach to the issue of legal defectiveness, the courts feel that such issues generally cannot be left to the jury without the benefit of expert testimony. The expert testimony required does not appear to be testimony as to what a consumer's expectations *are* but rather proceeds along the line of what a consumer's expectations *should* be.<sup>65</sup>

Therefore, the conclusion is soon reached that the courts are in fact applying a totally foreign test under the guise of this so-called "consumer expectations" test. In the words of the Supreme Court of Washington:

In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.<sup>66</sup>

Thus, to state that "[t]he consumer expectations test is natural since strict liability developed from the law of warranty,"<sup>67</sup> may assist in attaining

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note 19, § 402A comment i provides that "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the *ordinary consumer* who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* (emphasis added). Thus, the question is begged, who is the consumer in this case? This two-year-old? The reasonable (sic) two-year-old? The grandparents?

Clearly, the consumer expectations test is an example of an attempt to modify a commercial law standard (merchant's expectations) for a consumer-type transaction. Its literal emphasis on consumer satisfaction (quality of goods) is ill-suited to any inquiry into the redistribution of consumer injuries (safety of goods). Not only is the consumer expectation arguably that the product should be safe, but the test is demonstrably artificial when applied to, for example, a case in which a nonpurchaser/consumer has been injured. For the imposition of liability in Missouri in favor of such a bystander despite the "consumer expectations" test, see *Giberson v. Ford Motor Co.*, 504 S.W.2d 8 (Mo. 1974).

65. See, e.g., *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cal. App. 3d 726, 732-33, 226 Cal. Rptr. 299, 303-04 (1986) (involving a breast prosthesis) which states:

When the product at issue is within the scope of common experience, the consumer expectation test may be applied without benefit of expert testimony . . . . As the subject of mammary implants is outside the realm of common experience, the expert testimony was relevant and admissible. Thus, evidence supports the trial court's finding that the implants were not expected to last a lifetime and that an ordinary consumer *should* expect a possibility of eventual deflation.

*Id.* (citation omitted) (emphasis added); see also *Hurt v. General Motors Co.*, 553 F.2d 1181, 1184 (8th Cir. 1977); *Kayser v. Rockwell Graphic Sys.*, 666 F.2d 1233, 1236 (8th Cir. 1982); *Birchfield v. International Harvester Co.*, 726 F.2d 1131, 1136 (6th Cir. 1984); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979).

66. *Seattle First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (Wash. 1975).

67. *Fischer, Products Liability-The Meaning of Defect*, 39 Mo. L. REV. 339, 348 (1974).



a better understanding of the historical basis of products liability; it does not, however, assist in determining which product related injuries will, let alone *should*, be redistributed.

The pretender to the theoretical throne has been the risk-utility test.<sup>68</sup> The Western District Court of Appeals of Missouri has been notable in its endorsement and application of this approach. In *Lewis v. Bucyrus-Erie, Inc.*,<sup>69</sup> the supreme court declined to determine the *theory* of products liability in Missouri. Prior to transferring that case, however, the Western District Court of Appeals had adopted the risk-utility theory as one factor to employ in deciding whether a product design defect was actionable. In the subsequent case of *Duke v. Gulf & Western Mfg. Co.*,<sup>70</sup> the same court again endorsed the risk-utility approach, somewhat ironically by adopting a well-recognized exception to that test:

Accordingly, although the question whether a risk-benefit analysis is essential to a prima facie case in technologically complex design defect cases has not yet been decided in Missouri, our courts have consistently found

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68. The most famous example of the application of risk-utility analysis comes to us from the leading California opinion, *Barker v. Lull Eng'g Co.* 20 Cal. 3d 413, 435, 573 P.2d 443, 457-458, 143 Cal. Rptr. 225, 239-40, (1978).

[A] trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) *if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.*

*Id.* (emphasis added).

For an illustration of the use of this risk-utility analysis in California, see *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982) (en banc), (bus manufacturer held liable to injured passenger for failure to place a guardrail within reach of passenger).

For a recent adoption of the risk-utility analysis, see *Rix v. General Motors Corp.*, \_\_\_\_ Mont. \_\_\_\_, 723 P.2d 195 (1986) (single brake system defective and unreasonably dangerous in light of technological feasibility of dual brake system at time vehicle manufactured). See also *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 880 (Alaska 1979); *Dart v. Wiebe Mfg.*, 147 Ariz. 242, \_\_\_\_, 709 P.2d 876, 879-80 (1985); *Ontai v. Straub Clinic & Hosp.*, 66 Haw. 237, 659 P.2d 734 (1983); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983).

For a discussion of some of the negligence issues that may infiltrate the risk-utility analysis, see *Birnbaum & Wrubel, "State of the Art" and Strict Products Liability*, 21 TORT & INS. L.J. 30, 37-38 (1985).

69. 622 S.W. 2d 920 (Mo. 1981) (en banc).

70. 660 S.W.2d 404, 413 (Mo. Ct. App. 1983). Cf. *Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 836-37 (Mo. Ct. App. 1984) (because the issue was not preserved for review, the Eastern District Court of Appeals rejected defendant's attempts to gain consideration of risk-utility analysis).

that in technologically simple cases, a submissible case can be made absent such an analysis.<sup>71</sup>

Finally, the gauntlet was picked up by the Missouri Supreme Court in *Nesselrode v. Executive Beechcraft, Inc.*<sup>72</sup> The majority opinion in *Nesselrode* provides the first extensive review by the supreme court of the theoretical basis for strict products liability. Despite this encouraging development, no final conclusion as to this issue was reached. The court stated:

Though Missouri has adopted the rule of strict tort liability as set forth in the *Restatement*, we have not yet formally incorporated, in any meaningful way, the *Restatement's consumer expectation test* into the lexicon of our products liability law. Nor have we yet decided to travel or required plaintiffs to travel the path of risks and utilities. And in this connection, we note that none of the parties in the present case, at either the trial level or on appeal, has raised as an issue the applicable standard by which to determine when a product as designed, is defective and therefore actionable.<sup>73</sup>

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71. 660 S.W.2d at 413. This approach is in accord with the leading case of *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 68, 577 P.2d 1322, 1326 (1978):

[T]he court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable. The trial court should not permit an allegation of design defect to go to the jury unless there is sufficient evidence upon which to make this determination . . . . In some cases, because of the relatively uncomplicated nature of the product or the design feature in question, evidence of the dangerous nature of the design in question or of a safer alternative design may be sufficient to permit the court to consider this factor adequately.

*Id.*

This accurate analysis of the plaintiff's burden in establishing that the product in question was *legally* defective should be distinguished from those cases where plaintiff is forced to establish, through the use of circumstantial evidence, the nature of the *factual* defect that allegedly caused plaintiff's injury. See generally *infra* text accompanying notes 97-108.

See generally *Kayser v. Rockwell Graphic Sys.*, 666 F.2d 1233 (8th Cir. 1982). For a Missouri case dealing with the relative weight to be allocated to types of expert testimony, see *Sparks v. Consolidated Aluminum Co.*, 679 S.W.2d 348 (Mo. Ct. App. 1984). See also *Limbocker v. Ford Motor Co.*, 619 S.W.2d 757, 760-61 (Mo. Ct. App. 1981).

72. 707 S.W.2d 371 (Mo. 1986) (en banc).

73. *Id.* at 377-78 (footnote and citation omitted); cf. *Hoppe v. Midwest Conveyor Co.*, 485 F.2d 1196, 1202 (8th Cir. 1973):

Liability alleged from defective design encompasses many factors not generally relevant to ordinary negligence in tort cases. The comparative design with similar and competitive machinery in the field, alternate designs and post accident modification of the machine, the frequency or infrequency of use of the same product with or without mishap, and the relative cost and feasibility in adopting other design (sic) are all relevant to proof of defective design.

*Id.* (citation and footnotes omitted).

Notwithstanding this conclusion, in determining the specific issues on appeal in *Nesselrode*, the majority opinion clearly utilized aspects of the risk-utility test.<sup>74</sup> Whether or not an appellate court chooses to utilize this test, however, is distinct from a more important threshold question. Should Missouri adopt *any* definition of “unreasonably dangerous”<sup>75</sup> or, instead, should it permit that phrase to be dealt with by its juries as an “ultimate issue?”<sup>76</sup> From the court’s deliberations on this question in *Nesselrode*,<sup>77</sup> it seems arguable that its existing treatment as an ultimate issue will be preserved.<sup>78</sup>

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74. 707 S.W.2d at 382; *cf.* *Hylton v. John Deere Co.*, 802 F.2d 1011, 1014-15 (8th Cir. 1986) (apparently reviewing trial court evidence going to risk-utility with the consumer expectations test).

75. A determination to provide a definition for the jury does not answer the separate question as to the appropriate test (or definition) to be utilized. *See* *Turner v. General Motors Corp.*, 584 S.W.2d 844, 846-51 (Tex. 1979) (shifting definition of defectiveness from consumer expectations to risk-utility formulation).

Even if Missouri was to adopt a definition of “unreasonably dangerous,” such as the risk-utility test, that would beg an additional question. Should the risk-utility test be considered as an ultimate issue or should it be defined by reference to, for example, Dean Wade’s criteria approved by the court in *Byrns v. Riddell Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976)? The reference to Dean Wade concerns the classic exposition of the factors to be considered in applying the risk-utility test to be found in Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973), apparently cited with approval by the court in *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 411-12 (Mo. Ct. App. 1983).

76. *See* *Vetri, Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293 (1975); *cf.* *Wade, supra* note 75.

77. 707 S.W.2d 371, at 378. *But cf. id.* at 389 (Judge Blackmar’s statement to the effect that, “I am not certain that the unadorned submission of unreasonable danger as an ultimate issue is appropriate for all products liability cases. I have particular reservations in cases in which a product has apparent social utility and cannot be made wholly safe.”). Unfortunately, Judge Blackmar’s statement may be applied to all products, all of which have *some* social utility and *some* dangerous propensity. The questions posed by so-called “unavoidably unsafe products” are discussed *infra*, text accompanying note 136. *See also* *Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 837 (Mo. Ct. App. 1984) (“We have been cited no Missouri authority requiring a trial court to define the terms ‘defective’ and ‘unreasonably dangerous.’”).

78. The court made extensive reference to the arguments of Professor Leon Green. *See* *Green, supra* note 32, at 1203-06. Professor Green makes much of the absence of any such definition from other torts. However, the examples he picks are all fairly simple utilizations of the natural meaning of the ultimate issue. That cannot be said of unreasonably dangerous which has no natural “jury” meaning outside of hazardous or perilous. The closest doctrinal analogy to section 402A is section 519 (ultrahazardous activities). Yet in that type of case, tight judicial control is kept over what may be characterized as ultrahazardous. *See supra* note 44.

For the Missouri Supreme Court, however, preservation of the existing ultimate issue will lead to the jury “giv[ing] this concept content by applying their broad collective intelligence and experience to the broad evidentiary spectrum of facts and circumstances presented by the parties.” *Nesselrode*, 707 S.W.2d at 378; *cf.* *Hen-*

Ironically, this result, arguably designed to further the decision-making role of the jury, instead will lead to that institution's ultimate disempowerment. The products liability jury's role, like the malpractice jury before it, will be reduced to choosing between competing experts' views as to which products are defective unreasonably dangerous, and hence which product risks should be redistributed.<sup>79</sup> The jury's meaningful role may only be perpetuated by supplying it with the true criteria for such redistribution.

Practical considerations also arise. The appellate courts will be forced into some definition of "unreasonably dangerous" for their own purposes. At trial, counsel, while not addressing the jury on the issue of, for example, risk-utility analysis, nevertheless might find it prudent to introduce such evidence in order to satisfy a potential appellate reviewer.<sup>80</sup>

Certainly, supreme court determination that a risk-utility analysis will not be adopted either as a definition of "unreasonably dangerous" or as a new ultimate issue would explain its failure to address an issue extensively discussed in *Duke v. Gulf & Western Mfg. Co.*;<sup>81</sup> specifically, the appropriate allocation of the burden of proof with regard to such a risk-utility analysis.

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derson, *Judicial Review of Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

In *Nesselrode*, the court concluded that "[t]he jury was provided a number of feasible alternative 'murphy proof' designs. They were free to infer that an alternative design would have been safer and would have prevented this accident." 707 S.W.2d at 382. Such a statement surely begs the question, if the court wishes the jury to undertake such a process, why not instruct it to do so? At least three possible answers suggest themselves. First, the court may be unconvinced that jury application of the risk-benefit analysis criteria would induce any tangible benefits, such as lower administrative costs for trial courts or cheaper information costs for insurers. Second, the court might feel that the introduction of structured criteria for the jury might upset the redistribution rationale that the court has instituted. If this is the case, the court should be explicit about it. Third, the court might feel that it would be faced with far more difficult appellate questions if the ultimate issue was to be defined or rephrased. The court would face unending invitations to second guess the jury determination. As the system presently operates, the court can maintain a general and more distanced supervisory stance without becoming so embroiled. See generally the somewhat cursory appellate review that the legal defectiveness issue received in *Racer v. Utterman*, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981), cert. denied and appeal dismissed sub nom. *Racer v. Johnson & Johnson*, 459 U.S. 803 (1982). See also *Aronson's Men's Stores v. Potter Elec. Signal*, 632 S.W.2d 472, 474 (Mo. 1982) (en banc), containing the somewhat facile statement that the whole point of pattern instructions is that they should not require further clarification, thus begging the question as to whether the existing instructions correctly approximate the doctrine that is being applied by the appellate courts on whose opinions the pattern instructions are based.

79. See, e.g., *Hylton v. John Deere Co.*, 802 F.2d 1011, 1014 (8th Cir. 1986).

80. See, e.g., *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 393 (Mo. 1986) (en banc) (Welliver, J., dissenting).

81. *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 410-13 (Mo. Ct. App. 1983).

The California Supreme Court, in *Barker v. Lull Engineering Co., Inc.*, was most specific as to this issue. The court stated:

Because most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the "risk-benefit" standard—e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer, we conclude that once a plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.<sup>82</sup>

To whatever extent the Missouri Supreme Court confronts the risk-utility analysis question, it will be forced to address some other difficult questions. One of these will entail examining the vitality of the heretofore well-respected "consumer expectations" test.

The *Barker* test places both the consumer expectations test, with the burden of proof remaining on the plaintiff, and the risk-utility test, with the burden of proof placed on the defendant, to the jury.<sup>83</sup> Given the pronounced pro-plaintiff stance of the then-constituted California Supreme Court,<sup>84</sup> it may be suggested that the court felt that the plaintiff's ends, although well served in most cases by the risk-utility test, needed still further protection in, for example, manufacturing defect cases. Thus, in a quality control case, it would be far easier for a plaintiff to make her case utilizing the consumer expectations test rather than risking the introduction by a defendant manufacturer of a risk-utility analysis bearing upon its quality control system. As one appellate court recently has framed the issue:

Under current Arizona law the consumer expectation test is the appropriate one for a manufacturing defect, as opposed to a design defect. If something goes wrong in the manufacturing process, the result is a product which the manufacturer did not intend and which could hardly be contemplated by the consumer.<sup>85</sup>

With *Nesselrode* the supreme court has demonstrated an apparent neglect for the important, albeit limited, role of the consumer expectations test.

82. 20 Cal. 2d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978).

83. *Id.* at 429-36, 573 P.2d at 454-58, 143 Cal. Rptr. at 236-40.

84. *See, e.g., id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

85. *Boy v. I.T.T. Grinnell Corp.*, 150 Ariz. 526, \_\_\_, 724 P.2d 612, 620 (1986); *see also* *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 128-29, 417 N.E.2d 545, 552, 436 N.Y.S.2d 251, 258, (1981) (Jansen, Jones, & Meyer, J.J., dissenting) ("[A] defectively manufactured product is flawed because it is misconstrued without regard to whether the intended design of the manufacture was safe or not. Such defects result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction.").

It is virtually impossible to determine the nature of the substantive approach to the issue of "unreasonably dangerous" without considering the type of evidence that the jury will be permitted to consider. Therefore, any endorsement by the court of, for example, a more explicit utilization of the risk-utility analysis or a definition based upon consumer expectations would have to be accompanied by a determination as to the factors that would be considered in that context.<sup>86</sup>

### III. FACTUAL DEFECT AND LEGAL DEFECTIVENESS

In adopting the Restatement's test of defectiveness—"a defective condition unreasonably dangerous when put to a reasonably anticipated use"<sup>87</sup>—Missouri has opened itself up to a debate that has raged in many jurisdictions.<sup>88</sup> Specifically, the question is whether such a formulation creates a bifurcated test placing too great a burden upon the plaintiff.<sup>89</sup> Although some courts reacted unfavorably to such an expression of the test for liability,<sup>90</sup> the Missouri experience has been less dramatic.<sup>91</sup> The Missouri Supreme Court has stated that "a product may be found to be in a 'defective condition *unreasonably dangerous* to the user or consumer or to his property,' and, therefore, actionable under section 402A, when the product is found to be 'defective *and dangerous* when put to a use reasonably anticipated' by the manufacturer."<sup>92</sup>

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86. For example, if the Missouri Supreme Court refuses to admit state of the art evidence in the sense of industry capability at the time of manufacture, *see infra* text accompanying notes 171-73, then there would appear to be little necessity in shifting the burden of proof with regard to feasible alternatives to the manufacturer. *See generally infra* text accompanying notes 141-206 for discussion of state of the art evidence.

87. MAI 25.04, Strict Liability - Product Defect.

88. The quality of debate has not been assisted by the duplicative and circular definitions of "defective condition" and "unreasonably dangerous" to be found in RESTATEMENT, *supra* note 19, § 402A comments g and i, respectively.

89. Intermingled with that objection has been the feeling that the bifurcated test is more susceptible to the importation of negligence concepts. *See, e.g.*, Cronin v. Olson, 8 Cal. 3d 121, 133-34, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). *But see* Nesselrode v. Executive Beechcraft, 707 S.W.2d 371, 377 n.8 (Mo. 1986) (en banc).

90. *See, e.g.*, Cronin, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (excising "unreasonably dangerous" from the formulation). The Cronin formulation was itself abrogated by the Supreme Court of California's decision in Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (discussed further *infra* note 99). *See also* Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978).

91. *See, e.g.*, McGowne v. Challenge-Cook Bros., 672 F.2d 652, 661 (8th Cir. 1982).

92. Blevins v. Cushman Motors, 551 S.W.2d 602, 607 (Mo. 1977) (en banc) (emphasis added in part); *see also* Lietz v. Snyder Mfg. Co., 475 S.W.2d 105, 109 (Mo. 1972).

While a discourse featuring such circular reasoning may not be very helpful in furthering comprehension of the concept of legal defectiveness, it does not lead to a conclusion that the court is particularly disturbed by the basic language of the Restatement. More recent opinions suggest, however, that a degree of intermingling of these concepts may be endearing itself to the majority of the supreme court.<sup>93</sup> However, at the same time the supreme court seems to have few problems with the current wording of Missouri's approved instructions despite their apparent endorsement of the bifurcated test.<sup>94</sup> Nevertheless, the promise of doctrinal over-simplicity inherent in any such conflation undoubtedly will lead to problems for the lower courts.<sup>95</sup>

In fact despite extensive debate by the courts and academics, it is arguable that the bifurcated "defective condition unreasonably dangerous" test masks no mysterious, let alone menacing, defense-biased meaning. Rather, it involves a most simple statement of the content of plaintiff's cardinal burden of proof.<sup>96</sup>

Prior to addressing any *normative* issue of "legal defectiveness,"<sup>97</sup> the plaintiff first must establish that the product involved in the litigation is

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93. See, e.g., *Elmore v. Owens-Illinois*, 673 S.W.2d 434, 438 (Mo. 1984) (en banc) ("Thus, plaintiffs established that [the product] was 'defective' when they proved that it was unreasonably dangerous as designed."); *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 375 (Mo. 1986) (en banc) ("the plaintiff bears the burden of demonstrating that the product, as designed, is unreasonably dangerous and therefore 'defective.'").

94. See, e.g., *Nesselrode*, 707 S.W.2d at 377 n.9. The only recent problem that the Missouri Supreme Court had with the "defective condition unreasonably dangerous" formulation occurred in *Aronson's Men's Stores v. Potter Elec. Signal*, 632 S.W.2d 472 (Mo. 1982). *Aronson's* involved a burglary at a store during which the burglar alarm installed by the defendants failed to operate properly. The supreme court became embroiled in an argument as to whether the product was "defective" and "unreasonably dangerous." While the court seems correct in holding that the product was not (factually) defective—after all, the product's failing was identified by the plaintiff—it seems difficult to justify the court's opinion that the product was not "unreasonably dangerous." Under either the consumer expectations or the risk-utility test the product was (legally) defective. What was before the court was a completely different issue. Should strict tort liability apply at all to such a circumstance? See, e.g., *Sharp Brothers Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901 (Mo. 1986) (en banc). The *Aronson's* court's problems began when it attempted to answer that issue in terms of the basic test for legal defectiveness.

95. See, e.g., *Fahy v. Dresser Indus.*, No. 50783, slip op. at 14-15 (Mo. Ct. App. Jan. 27, 1987), in which plaintiff's expansive reading of *Elmore's* fusion of these issues was rejected by the court of appeals. Basically, plaintiff was suggesting that after *Elmore* his burden was reduced to establishing the existence of a defect and that it did not extend to having to show that the product could have been rendered safer.

96. See, e.g., *Southern Co. v. Graham*, 271 Ark. 223, 225, 607 S.W.2d 677, 679 (1980) (providing that "[t]he doctrine of strict liability does not change the burden of proof as to the existence of a flaw or defect in a product.").

97. The Restatement test for this being "unreasonably dangerous." As dis-

"factually defective."<sup>98</sup> Simply put, plaintiff must identify with some specificity what she alleges went wrong with the product.<sup>99</sup>

The classic example of how the failure to identify a factual defect in the product may pose an insurmountable obstacle to recovery is the Oregon case of *Heaton v. Ford Motor Co.*<sup>100</sup> The plaintiff was injured when his truck left the road. Evidence at trial established that the truck had hit a small rock some thirty-five miles earlier and, following the accident, the rim of one wheel was found to be separated from its center (or "spider"). According to the court, "plaintiff failed to introduce evidence of flawed manufacture or dangerous design."<sup>101</sup> Plaintiff's argument apparently was that a jury issue was disclosed on the basis that an ordinary consumer's expectations would be that trucks do not crash following collisions with small rocks. The court, however, was adamant that the plaintiff had the burden of proving the existence of a more specific defect.<sup>102</sup> As the *Heaton* court acknowledged,<sup>103</sup> plaintiff frequently will be able to rely upon circumstantial evidence to establish what went wrong with the product.<sup>104</sup> It must be re-

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cussed *supra* note 78, this may be achieved by making use of that Restatement term as the ultimate issue or, for example, by reference to the consumer expectations or risk-utility "tests."

98. In the language of the Restatement: "defective condition." See also *Higgins v. Paul Hardeman*, 457 S.W.2d 943, 947 (Mo. Ct. App. 1970) ("dangerous condition").

99. Compare jurisdictions that apply a burden shift on the issue of legal defectiveness. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 436, 573 P.2d 443, 457-58, 143 Cal. Rptr. 225, 239-40 (1978) (once plaintiff establishes factual defect and causation, burden shifts to defendant to rebut legal defectiveness).

100. 248 Or. 467, 435 P.2d 806 (1967) (en banc).

101. *Id.* at 471-72, 435 P.2d at 808.

102. *Id.* at 473-74, 435 P.2d at 809. Unfortunately the plaintiff's argument so concerned the court that it lost sight of the real issue in the case; whether plaintiff had established the existence of a *factual* defect. Instead, the court addressed directly the plaintiff's contention that the consumer expectations test should apply. Clearly, that issue arises only in the context of "legal defectiveness" and presupposes the identification by plaintiff of a factual defect.

103. *Id.* at 471-72, 435 P.2d at 808. Consider, for example, *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 371-73, 161 A.2d 69, 77 (1969); *Elmore v. American Motors Corp.*, 20 Cal. 2d 578, 583, 451 P.2d 84, 87, 75 Cal. Rptr. 652, 655 (1969) (en banc).

104. See, e.g., *Tucker v. Central Hardware Co.*, 463 S.W.2d 537 (Mo. Ct. App. 1971); *Lifritz v. Sears, Roebuck & Co.*, 472 S.W.2d 28, 32 (Mo. Ct. App. 1971); *Brisette v. Milner Chevrolet Co.*, 479 S.W.2d 176, 181-82 (Mo. Ct. App. 1972); *Williams v. Ford Motor Co.*, 494 S.W.2d 678, 681 (Mo. Ct. App. 1973); *Winters v. Sears, Roebuck & Co.*, 554 S.W.2d 565, 569-71 (Mo. Ct. App. 1977); *Williams v. Deere & Co.*, 598 S.W.2d 609 (Mo. Ct. App. 1980); *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421 (Mo. Ct. App. 1981); *Webster v. Empiregas Inc.*, 648 S.W.2d 198, 200 (Mo. Ct. App. 1983); *Fain v. GTE Sylvania*, 652 S.W.2d 163 (Mo. Ct. App. 1983); *Fisher v. Scott & Fetzer Co.*, 664 S.W.2d 662, 664 (Mo. Ct. App. 1984); *Uder v. Missouri Farmers Ass'n*, 668 S.W.2d 82, 92-93 (Mo. Ct. App. 1983);



membered, however, that "[t]he doctrine of strict product liability . . . does not relieve the proponent of a defective product claim from the burden of proof as to the existence of a defect."<sup>105</sup>

Of course, in practice, the issues of factual defect and legal defectiveness have a tendency to become intermingled.<sup>100</sup> Particularly in design and warning cases, plaintiff's expert testimony as to what went wrong with the product and what alternative approaches were available often will emerge as a seamless whole.<sup>107</sup>

In fact, it is really only in manufacturing defect cases that plaintiff habitually will face problems with regard to this factual defect issue.<sup>108</sup> It is primarily in those cases that the product defect alleged might have occurred only in the particular product involved in that particular case.

#### IV. WARNINGS AND UNAVOIDABLY UNSAFE PRODUCTS

##### A. *The Duty to Warn*

As the supreme court recognized in *Nesselrode v. Executive Beechcraft, Inc.*,

The determinative issue in a products liability failure to warn case is whether the information accompanying the product effectively communicates to the consumer or user the dangers that inhere in the product

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Patterson v. Foster Forbes Glass Co., 674 S.W.2d 599, 604 (Mo. Ct. App. 1984); Wadlow v. Lindner Homes, 722 S.W.2d 621, 625 (Mo. Ct. App. 1986). Cf. Lawson v. Schumaker & Blum Chevrolet, 687 S.W.2d 947 (Mo. Ct. App. 1985).

In Klein v. General Elec. Co., 714 S.W.2d 896, 900-01 (Mo. Ct. App. 1986), the homeowners brought a products liability action against the manufacturer of a coffeemaker that allegedly caused a fire. The court noted that under Missouri law proof of the existence and consequences of a defect did not require expert testimony. Nevertheless, it was clear that the court was impressed with the type of expert testimony that had been elicited.

105. *Mixon v. Chrysler Corp.*, 281 Ark. 202, —, 663 S.W.2d 713, 714 (1984) (citation omitted); see also *Miller v. Dvornik*, 149 Ill. App. 3d, 883, 501 N.E.2d 160, 165 (1986).

106. See, e.g., *Lifritz v. Sears, Roebuck & Co.*, 472 S.W.2d 28, 32 (Mo. Ct. App. 1971).

107. See, e.g., *Baker v. International Harvester Co.*, 660 S.W.2d 21, 23 (Mo. Ct. App. 1983).

108. One court arguably has overstated the issue when it stated, "Where the product is made precisely as it was intended to be made, the true test is whether the product is unreasonably dangerous when put to a use reasonably anticipated." *Caplaco One, Inc. v. Amerex Corp.*, 435 F. Supp. 1116, 1119 (E.D. Mo. 1977) (citations and reference omitted). More accurately, plaintiff will still have the burden of establishing the existence of a factual defect. However, that burden will be comparatively light, given the existence of identical products with the same alleged defect.

during normal use and the dangerous consequences that can or will result from misuse or abnormal use of the product. Warnings and directions concerning the proper use of a product and the consequences of misuse are intended primarily to lessen the level of risk.<sup>109</sup>

According to the approved instruction, plaintiff's task, with regard to demonstrating the existence of a marketing defect, is twofold. First, the product must be shown to have been "unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics."<sup>110</sup> Second, the defendant must not have provided an adequate warning.<sup>111</sup>

From the jury's perspective, there is an obvious disparity in the information costs incurred by consumers as opposed to those in the manufacturing and distribution chain. This realization, coupled with the presence of an injured plaintiff, renders as slight the ability of the manufacturer to escape liability on the ground of adequacy of warning.<sup>112</sup> As a result, in warning cases, primary attention is focused on the issue of the product's defectiveness absent the contended for warning.<sup>113</sup>

In Missouri, the issue of defectiveness in warning cases piggybacks the defectiveness inquiry in design cases. The plaintiff must establish that the

109. 707 S.W.2d 371, 382 (Mo. 1986) (reference and citation omitted).

110. MAI 25.05.

111. See also *Nesselrode*, 707 S.W.2d at 384. It would seem that a warning cannot be considered adequate unless, in addition to warning the consumer, the user is thereby warned of the dangers that can be expected in the event of failure to follow the warning. *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632, 638 (Mo. Ct. App. 1975).

112. See, e.g., *Michael v. Warner/Chilcott*, 91 N.M. 651, 579 P.2d 183 (Ct. App. 1978); *Bhagvandoss v. Beiersdorf*, 723 S.W.2d 392, 396 (Mo. 1987) (en banc) ("We conclude that the jury could find that the letter is not clear enough to warn hospital personnel that one method of use which had been common in the past should no longer be made."); cf. *Haines v. Powermatic Houdaille*, 661 F.2d 94, 96 (8th Cir. 1981); *Grady v. American Optical Corp.*, 702 S.W.2d 911, 917 (Mo. Ct. App. 1985). For recent cases holding that a manufacturer's written warnings were adequate as a matter of law, see *Walker v. Merck & Co.*, 648 F. Supp. 931, 935-36 (M.D. Ga. 1986); *Wilson v. Lockwood*, 711 S.W.2d 545, 548-49 (Mo. Ct. App. 1986). Note that both cases involved the presence (factually if not legally) of "learned intermediaries."

For the issues involved in the determination of the causal effect that a warning would have had, see *infra* text accompanying notes 253-60.

113. The exception is where manufacturers concentrate their energies on trying to establish that the particular distribution system utilized in their industry militates against any direct warning to the consumer, and, thus, that the warning as given was adequate. See, e.g., *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851, 857-60 (8th Cir. 1975); see also *Walker v. Merck & Co.*, 648 F. Supp. 931 (M.D. Ga. 1986). This so-called "learned intermediary" defense seldom operates outside of the prescription drug arena. For an interesting variation, see *Hill v. Air Shields*, 721 S.W.2d 112, 117-18 (Mo. Ct. App. 1986), in which defendant argued that it had no duty to warn a learned intermediary of risks within the realm of the intermediary's expertise. See generally *McCubbin & Schmidt, Missouri Pharmacists: Do They Have A Duty To Warn?*, 43 J. MO. BAR 23 (January-February 1987).

identified factual defect<sup>114</sup>—in this context, the alleged dangerous characteristic of the product in the absence of *any* warning—caused the product to be “unreasonably dangerous.” Even if this formulation is left to the jury without definition as to the ultimate issue,<sup>115</sup> the trial or appellate court will be forced to apply some more meaningful criteria.

Arguably, whether the court utilizes a consumer expectations or risk-utility test for legal defectiveness, it will be forced to examine evidence as to the available technology at the time of the product’s manufacture, thus making a nonsense of the supreme court’s current blanket refusal to consider “state of the art” evidence.<sup>116</sup> If the former test is utilized, it is difficult to question the proposition that consumers do not expect manufacturers to warn of dangers that are scientifically unknowable at the time of marketing. In the case of the latter test, it is clear that the costs associated with the warning of unknowable dangers would make it very difficult for the plaintiff to succeed on a risk-utility theory.

In large part this is due to the modified role that the traditional tests for legal defectiveness can have in this context. In marketing defect cases, risk-utility analysis cannot be employed in the same way as in design cases. Clearly it would be ridiculous to perform a balancing test in which the cost of precautions was the cost of the warning itself. Such would make it almost impossible for any product to escape the liability net. Instead, a far more subjective test should be instituted, owing as much to consumer expectations as to risk-utility analysis. In essence, the jury must be asked to judge the requirement of a warning in the context of the relative costs of information to the consumer and the manufacturer.<sup>117</sup> The availability of such information is, therefore, one of the costs that must be considered by the jury.

Thus, there is considerable potential for overlap at this point with what are considered obvious danger issues. In fact, in this context as in others,<sup>118</sup> defendant’s allegation of “obvious danger” is no more than shorthand for the argument that, with regard to this product, consumer-incurred infor-

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114. Factual defect is considered *supra* text accompanying note 98.

115. See discussion *supra* text accompanying note 78.

116. See *infra* text accompanying note 160.

117. See, for example, the California jury instruction in warning cases, plainly eschewing the combined risk-utility and consumer expectations approach California utilizes in manufacturing and design defect cases. Bar App’d J. Instr. 9.00.7 (Cal. 1984).

A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warning of such danger.

*Id.*

118. See *infra* text accompanying note 234.

mation costs were extremely low.<sup>119</sup> Furthermore, at common law a defendant who had evidence that a particular plaintiff's incurred information costs were lower than the typical consumer's was able to make a contributory fault argument.<sup>120</sup> Under Missouri's statutory *comparative* fault system, this affirmative defense is extended to situations in which, for example, plaintiff's information costs, objectively tested, are merely low.<sup>121</sup>

The apparent confusion as to the current state of Missouri law stems from the somewhat extravagant statements that have appeared in recent supreme court opinions. *Elmore's* blanket exclusion of state of the art evidence<sup>122</sup> was followed by *Nesselrode's* extreme position that, under a strict liability theory, "liability may be imposed without regard to the defendant's knowledge or conduct."<sup>123</sup> Such confusion is understandable in a jurisdiction that traditionally has distinguished between strict liability and negligence theories on the basis of constructive foresight.<sup>124</sup>

It may be argued that the *Elmore* opinion is to be restricted to design cases or to custom evidence.<sup>125</sup> It may be suggested that the majority opinion in *Nesselrode*, while correctly holding irrelevant a manufacturer's knowledge of risks in determining dangerousness, contained an unfortunate misconception that strict products liability extended that view to the issue of reasonableness of precautionary measure.<sup>126</sup> There may even be some satisfaction that the legislature acted swiftly to clarify the state of the art issue.<sup>127</sup> Nevertheless, doubts persist as to the supreme court's intentions in the duty to warn field.<sup>128</sup>

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119. See *McIntyre v. Everest & Jennings*, 575 F.2d 155 (8th Cir.), *cert. denied*, 439 U.S. 864 (1978); see also *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949 (8th Cir. 1982); *Einhaus v. O. Ames Co.*, 617 S.W.2d 519 (Mo. Ct. App. 1981); *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 418-19 (Mo. Ct. App. 1983); *Grady v. American Optical Corp.*, 702 S.W.2d 911, 916 (Mo. Ct. App. 1985); *Hill v. Air Shields*, 721 S.W.2d 112, 117-18 (Mo. Ct. App. 1986); *accord* *Bean v. Ross Mfg.*, 344 S.W.2d 18 (Mo. 1961) (en banc).

120. Cf. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36(3)[3] (1987).

121. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36(3)[4]-[5] (1987).

122. 673 S.W.2d 434, 437-38 (Mo. 1984) (en banc).

123. 707 S.W.2d 371, 383 (Mo. 1986) (en banc).

124. *Supra* text accompanying note 49.

125. See *infra* text accompanying note 163.

126. It seems clear under either view that the use must be foreseeable. See, e.g., *Grady v. American Optical Corp.*, 702 S.W.2d 911, 916 (Mo. Ct. App. 1985); see also *infra* text accompanying note 251.

127. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35 (1987); see *infra* text accompanying note 196.

128. For recent discussion of many of the difficult issues raised in the marketing allegation context, see *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 677 P.2d 1147, 200 Cal. Rptr. 870 (1984); *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); *Feldman v. Lederle Labs.*, 97 N.J. 429, 479 A.2d 374 (1984).

Of course, the court may have intended to introduce an additional species of stricter liability to deal with products that are "unreasonably dangerous per se." As the Supreme Court of Louisiana has stated:

For products in this category liability may be imposed solely on the basis of the intrinsic characteristics of the product irrespective of the manufacturer's intent, knowledge or conduct. This category should be acknowledged as giving rise to the purest form of strict liability and clearly distinguished from other theories in which the manufacturer's knowledge or conduct is an issue.<sup>129</sup>

If this remains the intention of the Missouri Supreme Court, it must announce such a purpose and produce a doctrinal construct for examination and application.<sup>130</sup> Any such stricter liability appears to be destined for products which, at the time of their manufacture, were incapable of being produced in a safe condition. Ironically, the original Restatement position was that such products should be accorded a *less* strict regime.<sup>131</sup>

### B. Unavoidably Unsafe Products

According to the Restatement, "[t]here are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. . . . Such a product, properly prepared, and accompanied by proper directions and warning is not defective, nor is it *unreasonably* dangerous."<sup>132</sup> At first sight, this recognition of a products subset performs a useful function. There exist a certain number of products that cannot be made safer without destroying their utility, and yet which society wishes to be marketed, albeit with appropriate warnings.<sup>133</sup>

Unfortunately, the sheer obviousness of this position guaranteed that this principle would be assimilated into the core doctrine of modern products

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129. *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113-14 (La. 1986). The adoption of such a form of "stricter liability" is a *logically* supportable position for a court to adopt and, indeed, would provide a category in which some of our modern mass-disaster/toxic torts type cases could be pigeonholed. As yet, however, there is no suggestion of any criteria by which such a categorization would be triggered. *Halphen* fails to provide any meaningful distinction between this "stricter" form of liability and the existing species. In fact, the case stands for no more than the proposition that some products fail the risk-utility test so badly that they should not be marketed even with a warning. See *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1273-74 (8th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

130. The provision by the legislature of a formal state of the art defense will make such a task difficult. See H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35 (1987).

131. RESTATEMENT, *supra* note 19, § 402A comment k.

132. *Id.*

133. See, e.g., *Caplaco One, Inc. v. Amerex Corp.*, 435 F. Supp. 1116, 1120 (E.D. Mo. 1977) ("Comment k applies only where the danger is unavoidable, inevitable, as where there are dangerous-side effects to a drug."). See *generally* Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 36-37, 402 N.E.2d 194, 199 (1980).

liability, thus rendering any additional "unavoidably unsafe" characterization redundant.<sup>134</sup> That product category was designed as a control device to hinder overreaching by the consumer expectations test. The doctrine has no role to play when a risk-utility analysis is being used as the determinant of legal defectiveness in a design case.<sup>135</sup> A product that is *unavoidably* unsafe is one for which there is no feasible alternate design<sup>136</sup> and therefore is not "unreasonably dangerous." The court of appeals has indicated that this approach approximates the law obtaining in Missouri, stating that:

Comment k to the Restatement recognizes that "unavoidably unsafe" products achieve protection despite their danger "when accompanied by proper directions and warning." Otherwise they do not. *We believe that the reasons for recognizing the doctrine of strict liability in tort are equally applicable to products unavoidably unsafe which carry no warning or inadequate warning of their danger.*<sup>137</sup>

Absent the natural and original meaning of comment k, defendants have attempted to adapt it to another role. Thus, there has been an attempt to

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134. For example, see *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1273 (8th Cir.) *cert. denied*, 419 U.S. 1096 (1974), where the court stated:

Such [unavoidably dangerous] products are not necessarily "unreasonably dangerous," for as this Court has long recognized in wrestling with products liability questions, many goods possess both utility and danger. Rather, in evaluating the possible liability of a manufacturer for injuries caused by his inevitably hazardous products, a two-step analysis is required to determine first, whether the product is so unsafe that marketing it at all is "unreasonably dangerous per se", and, if not, whether the product has been introduced into the stream of commerce without sufficient safeguards and is thereby "unreasonably dangerous as marketed." In either case, the applicable standard [is the consumer expectations test].

*Id.* (emphasis in original) (citations omitted).

135. The unavoidably unsafe doctrine has no applicability with regard to either manufacturing or marketing defect allegations. With regard to the former a product cannot be *unavoidably* unsafe when other examples coming off the same production line *are* safe. With regard to marketing defects, it is clear that an "unavoidably unsafe" product may be marketed *only* if it is accompanied by an adequate warning.

136. See *Caplaco One, Inc. v. Amerex Corp.*, 435 F. Supp. 1116, 1120 (E.D. Mo. 1977):

Assuming arguendo that Comment k does apply, liability does not attach where proper warnings are present and where the utility of the product outweighs the dangers accompanied by its use. As stated earlier, the Court has found the warnings adequate to apprise the consumer of the condition of the fire extinguisher, and also finds that the utility of the fire extinguisher outweighs any danger which accompanies it.

*Id.* (citation omitted); see also *Blevins v. Cushman Motors*, 551 S.W.2d 602, 608 (Mo. 1977) (en banc) (golf cart capable of being designed safely).

137. Cf. *Racer v. Utterman*, 629 S.W.2d 387, 393 (Mo. Ct. App. 1981) (emphasis added) (holding unavoidably unsafe surgical drape unreasonably dangerous in the absence of an adequate warning), *cert. denied and appeal dismissed sub nom. Racer v. Johnson & Johnson*, 459 U.S. 803 (1982).

use the unavoidably unsafe doctrine as a conclusory label placed upon certain products or types of products to reflect a judicial determination that the full rigors of the strict liability system should not be placed upon the manufacturer. Originally utilized in the blood transfusion cases of the previous decade,<sup>138</sup> there has been a recent reawakening of the potential for such characterization in the area of prescription drugs. For example, in *Feldman v. Lederle Laboratories*, the New Jersey Supreme Court rejected defendant and *amici* arguments that *all* prescription drugs should be exempted from the strict liability system.<sup>139</sup> However, the court was less dogmatic when addressing claims that comment k was applicable:

[W]e see no reason to hold as a matter of law and policy that all prescription drugs that are unsafe are unavoidably so. Drugs, like any other products, may contain defects that could have been avoided by better manufacturing or design. Whether a drug is unavoidably unsafe should be decided on a case-by-case basis; we perceive no justification for giving all prescription drug manufacturers a blanket immunity from strict liability manufacturing and design defect claims under comment k.<sup>140</sup>

## V. STATE OF THE ART EVIDENCE

Dwarfing all issues as to the theoretical basis of modern products liability is the current debate, now joined by the Missouri courts, with regard to the admissibility of so called state of the art evidence.<sup>141</sup> To the dismay of the defense, recent opinions tend to suggest that Missouri has aligned itself with the most pro plaintiff jurisdictions in this regard and have disallowed *all* such evidence. As a result, the Missouri legislature has been forced to respond with a partially curative measure.<sup>142</sup>

From the defense perspective, the *bete noire* in this area is the opinion of the New Jersey Supreme Court in *Beshada v. Johns-Manville Products Corp.*<sup>143</sup> In *Beshada*, the court overruled the trial judge's refusal of plaintiff's

138. See, e.g., *Brody v. Overlook Hosp.*, 66 N.J. 448, 332 A.2d 596 (1975); cf. *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

139. 97 N.J. 429, —, 479 A.2d 374, 380-83 (1984).

140. *Id.* at —, 479 A.2d at 383; see also *Kearl v. Lederle Labs.*, 172 Cal. App. 3d 812, 218 Cal. Rptr. 453 (1985); cf. *Brown v. Superior Court*, 227 Cal. Rptr. 768 (Ct. App. 1986) (prescription drugs are unavoidably unsafe); *Collins v. Karoll*, 231 Cal. Rptr. 396 (Ct. App. 1986) (prescription *products* are unavoidably unsafe as a matter of law).

141. See generally *Robb, A Practical Approach to the Use of State of the Art Evidence in Strict Products Liability Cases*, 77 Nw. U. L. REV. 1 (1982); *Wade, On the Effect in Product Liability of Knowledge Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983).

142. See *infra* text accompanying note 196.

143. 90 N.J. 191, 447 A.2d 539 (1982).

motion to strike a state of the art defense. This was in the face of the defendant's argument that,

the question of whether the product can be made safer must be limited to consideration of the available technology at the time the product was distributed. Liability would be absolute, defendants argue, if it could be imposed on the basis of a subsequently discovered means to make the product safer since technology will always be developing new ways to make products safer. Such a rule, they assert, would make manufacturers liable whenever their products cause harm, whether or not they are reasonably fit for their foreseeable purposes.<sup>144</sup>

The wave of panic that greeted *Beshada* is reputed to have reached Missouri<sup>145</sup> courtesy of the recent supreme court decisions *Elmore v. Owens-Illinois, Inc.*,<sup>146</sup> and *Nesselrode v. Executive Beechcraft, Inc.*<sup>147</sup> In *Elmore*,<sup>148</sup> an asbestosis victim and his wife sued for damages allegedly resulting from the victim's prolonged exposure to asbestos dust. The defendant had manufactured an insulating material containing fifty percent asbestos that plaintiff had often been exposed to over a ten year period. Unlike most recent examples of asbestos litigation,<sup>149</sup> the plaintiff in *Elmore* submitted on the basis of an alleged design defect<sup>150</sup> rather than on a marketing defect theory.<sup>151</sup>

When defendant raised this issue on appeal, the supreme court stated: "It is a plaintiff's prerogative to choose the theory upon which he will submit his case, so long as that theory is supported by the pleadings and the evidence."<sup>152</sup> In general terms, an asbestosis plaintiff who wished to submit on a design defect theory "would have to show that the product. . . could have been manufactured with[, for example,] a substitute element which would have made the product safer and at the same time maintained its effectiveness for its intended use."<sup>153</sup> It is unclear exactly how the *Elmore* plaintiff managed to satisfy this burden in this particular case. Although apparently resolved, the issue of which theory to submit the case on was to continue to

144. *Id.* at 202-03, 447 A.2d at 545-46; cf. *Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986).

145. Prior to those opinions the issue was alluded to by the court of appeals in *Racer v. Utterman*, 629 S.W.2d 387, 394-95 (Mo. Ct. App. 1981), *cert. denied and appeal dismissed sub nom.* *Racer v. Johnson & Johnson*, 459 U.S. 803 (1982).

146. 673 S.W.2d 434 (Mo. 1984) (en banc).

147. 707 S.W.2d 371 (Mo. 1986) (en banc).

148. See Note, *When the Best Defense is No Defense: The Future of State of the Art Evidence in Product Liability Actions in Missouri*, 50 Mo. L. Rev. 438 (1985).

149. For example, see the cases cited in Judge Welliver's dissent, 673 S.W.2d at 411.

150. MAI 25.04, *supra* note 23.

151. MAI 25.05, *supra* note 23.

152. *Elmore*, 675 S.W.2d at 437 (citation omitted).

153. St. Leger, Goggin & Brophy, *Toxic Torts: Workable Defenses Available to the Corporate Defendant*, 28 VILL. L. REV. 1208, 1250 (1983).



dominate the *Elmore* appeal,<sup>154</sup> particularly with regard to the state of the art issue.<sup>155</sup>

Defendant asserted that its product was not defective, unreasonably dangerous "if it [could] be shown that under the state of the art during the time of manufacture defendant could not have known of the product's unreasonable danger."<sup>156</sup> It would appear that the supreme court interpreted this argument as being one of the following species: the defendant should not be held liable because the risk involved with this product was not a foreseeable one, or that the product was not defective because, at the time of manufacture, it was the state of the art of the industry to design this product in this particular way.

Clearly the supreme court was correct when it stated that "the sole subject of inquiry [in a strict products liability claim] is the defective condition of the product and not the manufacturer's knowledge, negligence or fault."<sup>157</sup> It is equally clear that if the defendants were attempting to argue state of the art in either of the two meanings ascribed to it by the supreme court, then such evidence was not admissible. In the first place, whether or not the manufacturer foresaw or reasonably should have foreseen the risks attendant upon his product is irrelevant in a strict liability claim involving a marketing or design allegation.<sup>158</sup> As to the second meaning, again, the court was correct because "the plaintiff need not prove the violation of the standard of reasonable care for product design, but only that it was so defective as to make the product unreasonably dangerous for the anticipated use."<sup>159</sup>

Despite the wholly supportable conclusion as to the inadmissibility of the species of state of the art evidence proffered in *Elmore*, however, it is by no means so clear that the supreme court should have made such a blanket statement as "the law in Missouri holds that state of the art evidence has no bearing on the outcome of a strict liability claim."<sup>160</sup> In short, *Elmore* appears to be a case designed to be distinguished!

Firstly, it is an asbestosis case. Of course, it is almost heretical to assert that modern products doctrine could be so subject matter sensitive.<sup>161</sup> However, even in New Jersey, the rigorous approach that distinguished the *Be-*

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154. See, e.g., 673 S.W.2d at 439-40 (Welliver, J., dissenting).

155. See generally Note, *supra* note 148.

156. *Elmore*, 673 S.W.2d at 437.

157. *Id.* at 438 (citing *Crysts v. Ford Motor Co.*, 571 S.W.2d 683 (Mo. Ct. App. 1978)).

158. *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 491-94, 525 P.2d 1033, 1036-37 (1974). For Missouri authority on this point, see *supra* note 49.

159. *Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884, 885 (Mo. Ct. App. 1984).

160. *Elmore*, 673 S.W.2d at 438.

161. See *infra* note 262.

*shada* opinion has not been extended to other types of cases.<sup>162</sup> In the second place, the unique submission on a design defect theory by plaintiff in *Elmore* poses the question whether the ruling of the supreme court with regard to the inadmissibility of the state of the art evidence has any bearing on such an issue in the case of a marketing defect (failure to warn) allegation.<sup>163</sup> The third difficulty with *Elmore* is that the majority of the supreme court failed to define exactly what it meant by state of the art evidence. Only some of these issues have been dealt with in the subsequent opinion of the Missouri Supreme Court in *Nesselrode v. Executive Beechcraft, Inc.*,<sup>164</sup> a case in which fears of a continued pro plaintiff shift by the Missouri courts hardly were assuaged.

*Nesselrode* involved an airplane crash caused by the improper installation of the elevator trim tab actuators on the tail section of an airplane in which plaintiffs' deceased was a passenger. Plaintiffs submitted their case on both design and marketing defect theories. The defendant's central challenge on appeal was that the plaintiffs had failed to make a submissible case under either theory. State of the art evidence was not an issue in the case. Nevertheless, frequent citation to *Elmore*<sup>165</sup> suggests not only continued supreme court approval of that decision but, possibly, its extension to failure to warn cases. Specifically, the court in *Nesselrode* stated:

Under the decisional law of Missouri, a plaintiff has two options. He can bring his failure to warn case under a theory of negligence, or he can bring his action under Section 402A. Under the former theory, knowledge is a relevant consideration. But under the latter theory, *liability may be imposed without regard to the defendant's knowledge or conduct. This view comports with the very raison d'être of strict tort liability law. In Elmore, we reaffirmed the principle that strict tort liability is not predicated on the presence of fault or the existence of knowledge. . . .*<sup>166</sup>

In the subsequent case of *Lippard v. Houdaille Industries, Inc.*, the supreme court recollected *Elmore* as holding "that a manufacturer could be liable for a defective product, even though the state of the art at the time

162. See, e.g., *Feldman v. Lederle Labs.*, 97 N.J. 429, —, 479 A.2d 374, 385-86 (1984); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983). Other courts have recognized New Jersey's ambivalence. See *Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986).

163. *Elmore* has been followed in two subsequent Missouri appellate decisions. In *Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884 (Mo. Ct. App. 1984) and in *Klein v. General Elec. Co.*, 714 S.W.2d 896, 905 (Mo. Ct. App. 1986), defendants successfully utilized *Elmore* to resist the introduction of "state of the art" evidence. Not only were both of these cases submitted on a design defect theory, but, furthermore, in both cases the proffered evidence clearly went to the irrelevant issue of defendant's fault.

164. 707 S.W.2d 371 (Mo. 1986) (en banc).

165. 673 S.W.2d 434 (Mo. 1984) (en banc).

166. 707 S.W.2d at 383 (citations omitted) (emphasis added).

of manufacture or sale was such that the defective character could not have been known."<sup>167</sup>

The Missouri Supreme Court is not alone in experiencing difficulties with the state of the art concept. The real problem is that different people, particularly plaintiffs as opposed to defendants,<sup>168</sup> ascribe very different meanings to that phrase in the products liability context.

State of the art may have as many as three different meanings in modern products liability litigation.<sup>169</sup> First, it may refer to the generally accepted practices of the particular industry in question at the time that the product was manufactured (industry *practice*).<sup>170</sup> Second, state of the art may refer not merely to the customary practices of the industry in question,<sup>171</sup> but rather to the available technology at that time (industry *capability*).<sup>172</sup> Thus, state of the art may connote a defense argument to the effect that plaintiff has

167. 715 S.W.2d 491, 492 (Mo. 1986) (en banc).

168. Also note that different results may well pertain depending upon whether the "state of the art" evidence is being used for defensive (for example, compliance with industry custom), offensive (for example, noncompliance with industry custom) or even counter-offensive (*infra*, text at note 186) purposes. Compare the apparent suggestion by Justice Welliver in *Elmore*, 673 S.W.2d at 440, that the fact plaintiff *could* introduce offensive state of the art evidence is sufficient rationale for permitting defensive evidence of that type.

169. This fails to take account of the multitude of legislative meanings of this concept. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-681(6) (1982); COLO. REV. STAT. § 13-21-403(a) (1977); IDAHO CODE § 6-1406 (Supp. 1986); IND. CODE ANN. § 34-4-20A-4(b)(4) (Burns 1986); NEB. REV. STAT. § 25-21, 182 (1985); TENN. CODE ANN. § 29-28-105(b) (1980); *see also* H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(1) (1987).

170. *See, e.g.*, IND. CODE ANN. § 34-4-20A-4(b)(4) (Burns 1986). A similar meaning to, or perhaps subsidiary meaning of, this custom type "state of the art" is where a manufacturer wishes to make defensive reference to government or industry codes prevailing at the time of manufacture. *See, e.g.*, Annotation, *Admissibility of Evidence on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association*, 58 A.L.R.3d 148 (1974). For Missouri's position, *see* *Murphy v. L & J Press Corp.*, 558 F.2d 407 (8th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Poches v. J.J. Newberry Co.*, 549 F.2d 1166 (8th Cir. 1977). *See also* *Reed v. Tiffin Motor Homes*, 697 F.2d 1192, 1198 (4th Cir. 1982).

171. A gray issue appears when defendant seeks to introduce evidence of the custom of the industry *in order to show that the industry lacked the capability to produce* the alternative safer design.

172. *See generally*, Annotation, *Products Liability: Admissibility of Defendant's Evidence of Industry Custom or Practice in Strict Liability Action*, 47 A.L.R.4th 621, 624 n.1 (1986). *See also* Robb, *supra* note 141, at 2, 5 (footnote omitted) (defining state of the art as "then-existing technical capability" and "the point of scientific and technological advance with respect to a given product at the time of the product's manufacture and design") ("technological feasibility at the time of manufacture of producing a safer product"); *see, e.g.*, *Foster v. Caterpillar Tractor Co.*, 714 F.2d 654 (6th Cir. 1983) (at time of manufacture battery conformed to government standards and industry practice).

failed to introduce sufficient evidence as to the existence of a feasible alternative design available at the time this particular product was manufactured.<sup>173</sup> The third possible meaning of state of the art refers to "the scientific knowability at the time of manufacture of a risk associated with the product,"<sup>174</sup> (industry knowability).<sup>175</sup>

It is arguable that the Missouri Supreme Court in both *Elmore* and *Nesselrode* dealt only with the admissibility of state of the art evidence in the first sense.<sup>176</sup> Consequently, the argument may be made that not only should state of the art evidence in the second and third senses be admissible in a strict products liability action,<sup>177</sup> but, furthermore, that the very issues posed by the accepted definition of defective condition unreasonably dangerous simply cannot be addressed absent such evidence.<sup>178</sup>

Of course, this criticism is posited on the hypothesis that a court should judge a product's defectiveness in the light of available technology at the time of manufacture. Logically, a court that has dispensed with a fault based system could judge that issue by reference to the technology existing at the time of trial.<sup>179</sup> However, Missouri, from the time of its adoption of Section

173. Cf. *Cryts v. Ford Motor Co.*, 571 S.W.2d 683, 689 (Mo. Ct. App. 1978) (holding that plaintiff had introduced sufficient expert testimony as to availability of alternative technologies at time of manufacture to overcome defendant's argument that product had been built according to state of the art).

174. See, e.g., *Birnbaum & Wrubel*, *supra* note 68, at 31; see also Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983).

175. A workable definition of scientific knowability is to apply the "manufacturer as expert" test. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 115 (La. 1986); see also H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(1) (1987).

176. For a discussion of the admissibility of feasibility evidence contrasted with custom evidence, see *Lenhardt v. Ford Motor Co.*, 102 Wash. 2d 208, 210-14, 683 P.2d 1097, 1099-1101 (1984).

177. In some jurisdictions "state of the art" evidence under the first meaning is considered admissible on the basis that industry custom at the time of manufacture is relevant to the prevailing "consumer expectations" at that time. See, e.g., *Carter v. Massey-Ferguson*, 716 F.2d 344, 347 (5th Cir. 1983) (evidence of industry customs relevant to ordinary consumer expectations); cf. *Lenhardt*, 102 Wash. 208, 683 P.2d 1097 (evidence of industry custom as a factor in evaluating consumer expectations is not admissible unless plaintiff first puts industry custom into issue).

178. See, e.g., *Birnbaum & Wrubel*, *supra* note 68, at 33:

[T]o the extent that strict liability focuses on the product rather than on the defendant's conduct, state of art evidence addresses the question of whether the product was defective at the time of manufacture. In the context of a failure to warn case, it is clear that a product cannot be made safer by the addition of a warning if science and technology do not suggest to the manufacturer that there is any hazard or risk to warn about.

*Id.*

179. For a summary of some of the competing arguments, see *Wade*, *supra* note 141, at 751-56.

402A, apparently opted for a less stringent approach; what may be termed a manufacturer's hindsight rule.<sup>180</sup> Under this approach, any evidence as to what the manufacturer knew, or should have known, with regard to the hazards associated with its product are irrelevant. Yet, the jury, while effectively imputing this knowledge of risk of harm to the manufacturer,<sup>181</sup> must then determine "whether a reasonable manufacturer, with knowledge of such dangers, nevertheless would have put the product on the market."<sup>182</sup> It will be unable to carry out this mandate without the benefit of evidence of industry capability at the time of manufacture.<sup>183</sup>

It may be that the Missouri Supreme Court has resolved to abandon this approach to determining legal defectiveness. If it has, it is not a step that has been forced upon the court by the nature of strict liability as previously understood in Missouri. Neither is products liability doctrine alone *capable* of providing answers to such questions. Rather, the supreme court must determine, metalegally, the number of product related risks that it wishes to redistribute. A commitment to a particular doctrinal construct must be the conclusion to such a process.

It is equally clear that there is no *logical* reason why the product's safety should be judged by reference to the technology or knowledge available at the time of design, manufacture, injury or trial. On the other hand, an overly-general, not to mention inflammatory,<sup>184</sup> assertion that "[t]he purpose of products liability law, essentially, is to socialize the losses caused by defective products"<sup>185</sup> does not furnish a *doctrinal* explanation of why a defendant should be liable for a product related injury for which there was no known alternative feasible design even at the time of trial.

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180. See cases cited *supra* note 49; see also the discussion of this approach in comparison with the consumer expectation test, *supra* note 61.

181. Hence the label of constructive foresight that often is applied to this approach.

182. For an example of the approach in another jurisdiction, see, for example, *Dart v. Wiebe Mfg.*, 147 Ariz. 242, \_\_\_, 709 P.2d 876, 883 (1985).

183. See, e.g., *McLaughlin v. Sikorsky Aircraft*, 148 Cal. App. 3d 203, 210, 195 Cal. Rptr. 764, 767 (1983):

It seems apparent that evidence the design comported with the state of the art is relevant to a proper determination of such cost and feasibility factors. In reaching this conclusion, we recognize the rule . . . that evidence of industry custom and usage is irrelevant in a products liability case. The distinction between what are the capabilities of an industry and what practice is customary in an industry must be kept in mind.

*Id.*; see also *O'Brien v. Muskin Corp.*, 94 N.J. 164, 463 A.2d 298 (1983).

184. Compare an earlier statement of Judge Donnelly: "Today, the Court ignores settled Missouri law and implants, again without a rationale, a scheme for redistribution of property." *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237, 247 (Mo. 1983) (en banc) (citation omitted), *cert. denied*, 466 U.S. 973 (1984).

185. *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 492 (Mo. 1986) (en banc) (Per Blackmar, J., in a somewhat different context).

Even if the Missouri courts fail to move from their current, rather Draconian stance, at the very least, a plaintiff who herself elects to introduce evidence that alternative feasible alternatives were available *at the time of the trial* should not be permitted to object to defendant's offer of evidence in rebuttal that no such feasible alternatives were available *at the time of manufacture*.

The facts of the recent Eighth Circuit opinion in *Adams v. Fuqua Industries, Inc.*<sup>186</sup> are illustrative. Plaintiff had purchased a lawnmower in 1971 from defendant's predecessor. She suffered a partial amputation of her right leg when she was thrown from the lawnmower in 1981. Defendant appealed from the trial court's entry of judgment of a jury verdict holding the defendant strictly liable for her injuries. At trial, plaintiff's experts testified that the cause of the accident was, *inter alia*, the absence of a "smooth-start" clutch and a "deadman" switch.<sup>187</sup> Crucially, neither of these safety devices were commercially feasible at the time of the product's manufacture; a fact that the plaintiff did not bring out. Absent such altruism, the Eighth Circuit was faced with the question whether the defendant should be permitted to introduce such evidence.<sup>188</sup>

The court made reference to leading Missouri cases stating that, "[Plaintiff] need not prove that the absent devices were or should have been known to [defendant] in 1971 when the mower was manufactured. That the mower was as safe as other mowers manufactured at the same time is irrelevant to the question whether the mower was unreasonably dangerous."<sup>189</sup> The Eighth Circuit, however, failed to make a distinction between this accurate statement and the defendant's proposition that *noncustom* state of the art evidence should be admissible. Instead, the court decided for the defendant on the narrower ground that:

In this case, [plaintiff] did not rely solely on the opinion of her experts that the danger could have been reduced by a deadman switch and a smooth-start clutch. She also proved that [defendant] and others included those devices in their mowers in 1981. Although this proof of what was actually done in 1981 corroborated the experts' testimony that such devices

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186. 806 F.2d 770 (8th Cir. 1986). (*Fuqua* has been withdrawn from the Federal Reporter pending modification. 806 F.2d 770. Its factual basis continues to provide an excellent example of the issue discussed. Reference will be made to the original slip opinion.)

187. Nos. 85-2382, 85-2383, slip op. at 4 (8th Cir. Dec. 1, 1986).

188. See, e.g., *Lenhardt v. Ford Motor Co.*, 102 Wash. 208, 213-14, 683 P.2d 1097, 1100 (1984) (en banc) (when plaintiff presents evidence that puts in issue the industry custom or feasibility of alternate designs, defendant is entitled to counter that evidence); *Cantu v. John Deere Co.*, 24 Wash. App. 701, 706, 603 P.2d 839, 841 (1979) (when plaintiff makes state of the art and industry standards an issue, the defendant is entitled to respond).

189. *Fuqua*, slip op. at 8 (citations omitted).

could have been used to reduce the danger, it inevitably and pointedly suggested to the jury that [defendant]'s conduct in omitting them from the mower sold to [plaintiff] in 1971 was unreasonable. This proposition is irrelevant to strict liability and was clearly prejudicial.<sup>190</sup>

As if to make clear that the substantive law of Missouri was not jeopardized by its decision, the court went on to comment that "Upon retrial, [plaintiff] may elect to forego proof that these devices are now used on mowers. *If she tries the case without such proof, she would not be opening the door to [defendant]'s proof.*"<sup>191</sup>

In conclusion, the Missouri Supreme Court has much work yet to do. Neither *Elmore*, *Nesselrode*, nor *Lippard* presented the opportunity for the court to hear full argument on the state of the art issue, *a fortiori*, in the context of marketing defects.<sup>192</sup> The result of those cases has been an invitation to the lower courts to merely incant the over-simplification that state of the art is irrelevant under the law of Missouri.<sup>193</sup>

While a brightline rule excluding all evidence which goes to, say, industry practice (mere custom) might be appropriate,<sup>194</sup> a more flexible approach could be considered with regard to evidence pertaining to industry capability or scientific knowability. This could be achieved by permitting the trial court to exercise its discretion as to the admissibility of such species of evidence.<sup>195</sup>

190. *Id.* at 9; see also *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 133 (8th Cir. 1985) (workplace regulations admissible to rebut, *inter alia*, plaintiff's argument as to safety of alternative design).

191. *Fuqua*, slip op. at 10 (emphasis added).

192. Indeed, the only previous reference to this issue in a Missouri case had been to the effect that

some products are, by their nature or the state of the art, unavoidably unsafe. So too do apparently useful and desirable products reach the market encumbered with known but apparently reasonable risks. The sellers of such products are not held to strict liability if the product is properly prepared and marketed with appropriate warnings.

*Keller v. International Harvester Corp.*, 648 S.W.2d 584, 588 n.1 (Mo. Ct. App. 1983) (interpreting RESTATEMENT, *supra* note 19, § 402A comment k).

193. See, e.g., *Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884, 885 (Mo. Ct. App. 1984).

194. *Cf. Lenhardt v. Ford Motor Co.*, 102 Wash. 2d 208, 215-19, 683 P.2d 1097, 1101-03 (1984) (Dimmick, J., dissenting) (arguing that state of the art evidence, even in its industry custom manifestation, is relevant to both consumer expectations and risk-utility analysis approaches to determining legal defectiveness).

195. Some jurisdictions have instituted this more flexible approach with regard to the analogous situation involving proffered evidence of previous safety history. For example, see *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, \_\_\_, 700 P.2d 819, 826-27 (1985), where the court stated that in design defect cases only (because such evidence clearly would be irrelevant in a manufacturing defect case)

the trial court has discretion under Rule 403 to admit evidence of safety-history concerning both the existence and the nonexistence of prior accidents,

The route chosen by the Missouri legislature is somewhat different. "State of the art" for the purposes of reform refers only to "industry knowability."<sup>196</sup> Questions with regard to the admissibility of "industry capability" evidence have been left for the courts.<sup>197</sup> Furthermore, the admissibility of "scientific knowability" evidence is restricted to marketing defect cases.<sup>198</sup> Thus, outside the marketing defect area, the traditional distinction between negligence<sup>199</sup> and strict liability<sup>200</sup> theories of products liability is preserved.

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provided that the proponent establishes the necessary predicate for the evidence. The evidence of safety-history is admissible on issues pertaining to whether the design caused the product to be defective, whether the defect was unreasonably dangerous, whether it was a cause of the accident, or in negligence cases-whether the defendant should have foreseen that the design of the product was not reasonably safe for its contemplated uses.

*Id.* (footnote omitted).

196. "[S]tate of the art" means that the dangerous nature of the product was not known and could not reasonably be discovered at the time the product was placed into the stream of commerce." H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(1) (1987).

197. "This section shall not be construed to permit or prohibit evidence of feasibility in products liability claims." H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(4) (1987). See *FINAL REPORT OF THE MISSOURI TASK FORCE ON LIABILITY INSURANCE* (Jan. 6, 1987), Mo. SEN. J., March 4, 1987, at 382 ("The Task Force sees this as a separate issue, one upon which it is not making a specific recommendation to the General Assembly") [hereinafter *Final Report*]. But cf. "This recommendation does not apply to use of evidence in strict liability cases based on alleged manufacturing or design defects because the defense of feasibility is available." *Id.* at 381.

198. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(2) (1987).

199. The statute makes a point of stating that, "Nothing in this section shall be construed as limiting the rights of an injured party to maintain an action for negligence whenever such a cause of action would otherwise exist." H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(3) (1987). Not only is this provision redundant because § 35 is restricted by § 33 to strict products claims, but it begs the question as to how, in the future, a negligent *marketing* claim will differ from a strict liability claim to the same effect. In *Nesselrode* the majority opinion had made a point of distinguishing between negligence and strict liability based claims solely on the premise that, "[u]nder the [negligence] theory, knowledge is a relevant consideration. But under the [strict liability] theory, liability may be imposed without regard to the defendant's knowledge or conduct." 707 S.W.2d at 383. This distinction appears difficult to maintain once knowledge is admissible in the strict liability action. Another distinction that exists and that survives the statutory reform is the way the court's *focus* differs under the two theories. As the Supreme Court of California has remarked:

Arguably, the difference between negligence and strict liability standards in this situation is the focus: in the first, the jury must determine the reasonableness of the manufacturer's conduct; in the second, the determination is whether the product has been rendered defective because, applying an objective standard, and weighing the relevant costs and benefits, a warning was required.

Finn v. G.D. Searle & Co., 35 Cal. 3d 691, 700, 677 P.2d 1147, 1152, 200 Cal. Rptr. 870, 875 (1984); see also *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, \_\_\_, 402



Even in the case of marketing defects, that distinction remains in place with regard to plaintiff's case. *She* does not bear the burden of proving that the defendant had actual or constructive foresight of the risk of harm posed by its product. Rather, a burden of proving scientific unknowability is allocated to the manufacturer.

The legislation goes further, however, than a mere reversal of the post-*Elmore* line of cases. While state of the art evidence is to be admissible, the person asserting it shall have the burden of proof.<sup>201</sup> Thus, if the proffering of such evidence is *offensive*,<sup>202</sup> plaintiff will have the same burden as before.<sup>203</sup> If, as seems more likely, the evidence is proffered *defensively* or *counter-offensively*,<sup>204</sup> the burden of proof is allocated to the defendant. More than a simple burden shift, however, this new statutory formulation characterizes such evidence as establishing an affirmative defense.<sup>205</sup> As such, it will have to be specifically pleaded by the defendant who will have to offer an instruction to the same effect.<sup>206</sup>

## VI. REASONABLY ANTICIPATED USE

### A. In General

Posing the question of whether a product is defective unreasonably dangerous, without more, is to pose an essentially meaningless question. To

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N.E.2d 194, 198 (1980).

A different distinction based upon the allocation of the burden of proof is suggested *infra* text at note 201. Further, it appears that the Governor's Task Force thought that the most important distinction remaining was that, under a negligence theory, the plaintiff could bring action for failure to warn of a defect discovered after manufacture and sale. See *FINAL REPORT*, *supra* note 197, at 382.

200. In strict liability (manufacturing and design defect) cases, the manufacturer's knowledge of the risk of harm has been held to be irrelevant. For Missouri cases adopting this "constructive foresight" rule, see *supra*, text accompanying note 49.

201. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(2) (1987). Thus, providing a further distinction between a strict liability claim and one pursued using negligence doctrine. Post-*Beshada* courts have adopted a similar approach through judicial development. See *Feldman v. Lederle Labs.*, 97 N.J. 429, —, 479 A.2d 374, 388 (1984).

202. See generally *supra* note 168.

203. However, it is difficult to see how such offensive use of state of the art could ever constitute an affirmative defense! See H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(2) (1987).

204. See, e.g., *Adams v. Fuqua Indus., Inc.*, Nos. 85-2382, 85-2383 (8th Cir. Dec. 1, 1986).

205. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 35(2) (1987).

206. See generally MAI 3.01 for instruction on the burden of proof. As to the specific defense defendant will have to offer an instruction to the effect that, for example,

Your verdict must be for the defendant if you believe: At the time when the [describe product] was placed in the stream of commerce the dangerous nature of the product was not known and could not reasonably be discovered.

avoid the label "absolute liability," the defectiveness issue must not solely depend upon the application of some decisional criteria.<sup>207</sup> Additionally, such criteria must be supplied with some context within which they may operate. Thus, a product's legal defectiveness may only be judged within the context of its utilization. This is doctrinally expressed as requiring a determination whether the product in question is defective for its reasonably anticipated (or foreseeable) use.<sup>208</sup> From the defendant's perspective, of course, any use of the product which it did not intend should not involve exposure to liability. Nevertheless, in Missouri, as in most other jurisdictions, it is well established that "[t]he issue is not what use [the defendant] intended for its product but what use of the product objectively was foreseeable."<sup>209</sup> Unfortunately, lurking beneath this essentially simple formulation are three difficult and overlapping concepts; foreseeable use *simpliciter*, product misuse, and foreseeable user.

### B. Foreseeable Use

The first of these issues to be confronted may be illustrated by the paradigmatic foreseeable use question; "Was it foreseeable that this knife would be used as a toothpick?" The obviousness of this example should not

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207. See *supra* text accompanying note 78, (discussion of the nature of the issue that should be left to the jury).

208. Obviously it is important to distinguish between the requirement of foreseeable use which is relevant in strict liability and foreseeable risk which, other than in marketing cases, is not. See *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 491-97, 525 P.2d 1033, 1036-37 (1974); see also *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 375 n.4 (Mo. 1986) (en banc); H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 33(2) (1987) ("[T]he product was used in a manner reasonably anticipated.").

209. *Laney v. Coleman*, 758 F.2d 1299, 1302 (8th Cir. 1985) (applying Missouri law); see also *Vanskike v. ACF Indus. Inc.*, 665 F.2d 188, 195 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Hoppe v. Midwest Conveyor Co.*, 485 F.2d 1196, 1200-01 (8th Cir. 1973); *Bhagvandoss v. Beiersdorf*, 723 S.W.2d 392 (Mo. 1987) (en banc); *Blevins v. Cushman Motors*, 551 S.W.2d 602, 607-08 (Mo. 1977) (en banc); *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 365-66 (Mo. 1969); *Higgins v. Paul Hardeman*, 457 S.W.2d 943, 948 (Mo. Ct. App. 1970); *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632, 638 (Mo. Ct. App. 1975); *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 414 (Mo. Ct. App. 1983).

This requirement of reasonably anticipated use was recognized as a component of Missouri's negligence based products liability doctrine. See, e.g., *White v. General Chem. Co.*, 136 S.W.2d 345, 348, 350 (Mo. Ct. App. 1940); cf. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36(3)[2] (1987), providing that, in the context of the defense of comparative fault, "fault" chargeable to the plaintiff includes "[u]se of the product for a purpose not intended by the manufacturer." However, this aspect of the new comparative fault defense must be read subject to § 33(2) stating that reasonably anticipated use is a requirement for strict products liability. Thus, the requirement of reasonably anticipated use remains as part of plaintiff's burden. However, defendant as an affirmative defense may allege the plaintiff's comparative fault, including the foreseeable but unintended use of the product.

cloud the importance of the inquiry. The question turns on the meaning allocated to "foreseeable." At the very least, something is foreseeable if it has occurred before or if someone of relevance predicted that it would occur.<sup>210</sup> It is these meanings of "foreseeable" that do much to occupy plaintiff's counsel during the discovery process<sup>211</sup> and defendant's counsel during the evidentiary phase of most trials.<sup>212</sup> As Judge Donnelly remarked in *Nesselrode*, "[o]rdinarily anticipated misuse would be shown by other incidents of such misuse. None of the [witnesses] had ever heard of such an occurrence."<sup>213</sup> Nevertheless, the ease with which some courts can exhaust the natural meanings of "foresight" provides an example of one cause of the continued expansion of modern products liability law.

It has been stated that "foreseeability does not require that prior identical or even similar events must have occurred."<sup>214</sup> Such an extended meaning of (un)foreseeable is not really a "meaning" at all. It is the judicial application of that term as a mere conclusory label for a decision already reached.<sup>215</sup> Thus, judicial (or jury) determination that using a knife as a toothpick is "unforeseeable" is nothing more than a convenient linguistic artifice ex-

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210. This latter meaning would include the manufacturer's intended use. See, e.g., *Commercial Distrib. Center v. St. Regis Paper Co.*, 689 S.W.2d 664, 670 (Mo. Ct. App. 1985); see also *Jackson v. Ray Kruse Constr. Co.*, 708 S.W.2d 664 (Mo. 1986) (Higgins, C.J., concurring).

211. An interesting illustration of this issue came about in the pre-litigation process in *Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881 (Mo. 1983) (en banc). The issue in that case revolved around what types of criminal conduct should have been foreseen by a hotel operator. As the case turned out the supreme court adopted a wide characterization of foresight of criminal activities, effectively holding that previous occurrence of some nonviolent criminal activity (e.g., theft and vandalism) could cause a reasonable innkeeper to foresee a violent physical assault. Clearly, however, the plaintiff, unaware of the supreme court's newly discovered disposition to make such a general characterization, must have been most anxious to identify, through the discovery process, previous events of this type (criminal sexual assaults). Thus is explained the collateral skirmish reported *sub nomine* *Tufts v. Madesco Inv. Corp.*, 524 F. Supp. 484 (E.D. Mo. 1981) (Missouri law does not recognize a private right of action for perjury).

212. Defense counsel will occupy herself trying to get the court to permit the introduction of "state of the art" evidence. Specifically, evidence either that no one else in this industry could have foreseen this danger ("scientific unknowability") or that even if this danger was known, the industry as a whole had not reacted in the way that plaintiff was arguing for (custom). For these and other meanings of "state of the art," see *supra* text accompanying note 169.

213. 707 S.W.2d at 391.

214. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985) (en banc) (Bird, C.J., concurring).

215. For a nice example of the way in which the judiciary may choose to (de)emphasize different meanings of foreseeability consider a leading opinion dealing with the duty of care in negligence cases. *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal. 3d, 49, 55-60, 665 P.2d 947, 950-53, 192 Cal. Rptr. 857, 860-63 (1983); cf. *id.* at \_\_\_\_, 665 P.2d at 955, 192 Cal. Rptr. at \_\_\_\_ (Kroninger, J., dissenting).

pressing a conclusion that, for various objective or subjective, logical or emotional, experiential or speculative, political, psychic, social or economic reasons, the losses attributable to this particular knife/toothpick/gum damage will not be redistributed.<sup>216</sup>

Consider, for example, *Baker v. International Harvester Co.*<sup>217</sup> Plaintiffs' decedent had been hunting from a combine when he fell off and was subsequently run over by the machine. According to the court of appeals,

The use of the ladder by decedent while holding onto a gun, without knowledge of such use by the combine operator, and at a time when the combine was being used to harvest beans in a rural area, was a use by decedent not intended nor anticipated by the manufacturer.<sup>218</sup>

This conclusion by the court was flung into the face of evidence adduced at trial that the *defendant's* product safety engineer, a hunter, had *personal experience* that people hunted from combines!<sup>219</sup>

### C. Product Misuse

In many contexts, the phrase "product misuse" is, itself, a conclusion. The most common defense posture is, after all, to attempt to shift evidence from the condition of its product to the conduct of the plaintiff. A defendant who successfully argued to a jury, and *a fortiori* to the judge,<sup>220</sup> that the plaintiff's injuries arose from an unforeseeable use of the product often will conclude (albeit erroneously<sup>221</sup>) that the court recognized some type of affirmative defense based on the plaintiff's conduct, rather than that the plain-

216. It should not be thought that the intricacies of foreseeable use occur only in complex design cases. In *Fitzgerald Marine Sales v. LeUnes*, 659 S.W.2d 917 (Tex. Ct. App. 1983), plaintiff had been thrown from a boat during a fishing trip. As he was ejected, the boat's steering wheel, which he was holding onto, broke. The steering wheel contained "voids" that reduced the strength of the wheel. The judgment of the trial court was reversed on the basis that there was no evidence to suggest that the steering wheel was unreasonably dangerous for its foreseeable use of steering as opposed to the use to which it was actually put, as a restraint.

217. 660 S.W.2d 21 (Mo. Ct. App. 1983).

218. *Id.* at 23.

219. *Id.* at 22. See also *Bhagvandoss v. Beiersdorf*, 723 S.W.2d 392 (Mo. 1987) (en banc), a manufacturing defect case, in which defendants suggested that a use which they *knew* about and inadequately warned of was not a reasonably anticipated use.

220. See, e.g., *Baker v. International Harvester Co.*, 660 S.W.2d 21, 23 (Mo. Ct. App. 1983) (directed verdict for manufacturer on issue of foreseeable use).

221. See, e.g., *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632, 637 (Mo. Ct. App. 1975) ("[A]bnormal use' . . . is not properly a defense but a necessary element of plaintiff's cause of action."). See also *Ellsworth v. Sherne Lingerie*, 303 Md. 581, 589-600, 495 A.2d 348, 352-56 (1985). But cf. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36(3)[1]-[2] (1987) (establishing both unanticipated and unintended uses as partial defenses).

tiff failed to meet her burden that the product was defective unreasonably dangerous for its reasonably foreseeable uses.<sup>222</sup> Such confusion was understandable given the existence of the affirmative defense (in Missouri, the *only* affirmative defense at common law<sup>223</sup>) of contributory fault. The confusion occurs because many contributory fault cases seem to involve flagrant product misuse.<sup>224</sup> Such confusion also may be dangerous, because it is well established that, under Missouri law, "even misuse may be foreseeable."<sup>225</sup>

A developing area of products liability doctrine involves the situation where the conduct of the plaintiff is such that the court (all other things being equal) would look favorably upon defendant's motion for directed verdict on the basis that the use of the product was so bizarre as to be "unforeseeable;" from the defendant's perspective, that the product had been misused. The classic example would be where the plaintiff's decedent decided to drive the defendant-manufactured motor vehicle at 150 miles per hour down a narrow twisty road. Most courts would be tempted by defendant's motion for directed verdict on the basis of unforeseeable use in such a case.<sup>226</sup> After all, this is not really the type of accident risk that the court would want to redistribute to the manufacturer, not in the least because of the grossly illegal speed involved.

Suppose, however, that the plaintiff has evidence that the manufacturer advertised the vehicle in question by demonstrating it descending a hill at 150 miles per hour? In such a case, the court is not likely to grant defendant's motion. Rather, it may view the defendant's self-serving promotion as capable of offsetting the plaintiff's unsafe conduct. Whereas defendants are eager to claim that a "defense" of product "misuse" has been recognized, here, plaintiffs will be eager to claim a victorious recognition of a "counter-defense" of encouraged (or invited) misuse.<sup>227</sup> In reality, of course, the plain-

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222. In some jurisdictions there is a specific defense of product misuse; a form of extreme and negligent, albeit foreseeable (mis)use.

223. Cf. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36 (1987).

224. See, e.g., *Ensor v. Hodgeson*, 615 S.W.2d 519, 525-26 (Mo. Ct. App. 1981).

225. *Rogers v. Toro Mfg. Co.* 522 S.W.2d 632, 638 (Mo. Ct. App. 1975); see also *McGowne v. Challenge-Cook Bros.*, 672 F.2d 652, 661-62 (8th Cir. 1982); *Hoppe v. Midwest Conveyor Co.*, 485 F.2d 1196, 1201 (8th Cir. 1973); *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 381 (Mo. 1986) (en banc); *Baker v. International Harvester Co.*, 660 S.W.2d 21 (Mo. Ct. App. 1983); *Higgins v. Hardeman*, 457 S.W.2d 943 (Mo. Ct. App. 1970).

226. Clearly the motion could also be made on the basis that the plaintiff's conduct was the sole proximate cause of her injuries (see *infra* text accompanying note 247) or that the affirmative defense of contributory fault was applicable.

227. For cases purporting to apply the encouraged misuse doctrine see *Fitzsimmons v. General Motors Corp.*, 24 ATLA L. REP. 290 (E.D. Ark. 1981) (settlement); *LeBoeuf v. Goodyear Tire & Rubber Co.*, 451 F. Supp. 253 (W.D. La. 1978), *aff'd*, 623 F.2d 985 (5th Cir. 1980); see also *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

tiff's attorney has merely proffered enough evidence to preserve the "reasonably foreseeable use" issue for jury determination.

#### D. *Foreseeable User*

Not only is the product's foreseeable use relevant to the decision whether it is defective unreasonably dangerous, but also the product's foreseeable user. This is important for plaintiff and defendant alike. Consider, for example, the question whether a well-written warning on the side of a bag of insecticide is adequate to render a product non-defective. Clearly, if plaintiff's attorney is able to convince the court that non-English speaking farm-workers were foreseeable users then the defendant will have little chance of establishing the adequacy of the warning.<sup>228</sup>

On the other hand, consider a case in which the defendant has failed to place any warning on a dangerous product. If the defense can establish that the only foreseeable users of the product already knew, or should have known,<sup>229</sup> of all the dangers that the defendant failed to warn about, then the plaintiff will be hard pressed to establish that the product was defective unreasonably dangerous for its foreseeable users.<sup>230</sup>

#### E. *"Per Se" Rules*

When one of these issues seems, in a sufficiently large number of cases, to raise the question as to whether they will support a defendant's directed verdict, it frequently attracts the inaccurate labelling of "defense." A recent example is the attention granted to the so-called "sophisticated user"<sup>231</sup> defense.

The adoption of such "per se" rules runs counter to the trend in modern products liability. Most of these rules had their origins in warranty or even pre-*MacPherson*<sup>232</sup> products law. Closely constructed sub-rules such as the

228. See *Hubbard-Hall Chem. v. Silverman Co.*, 340 F.2d 402 (1st Cir. 1965).

229. See, e.g., *Nesselrode*, 707 S.W. 2d at 393 (Donnelly, J., dissenting); see also *Bean v. Ross Mfg.*, 344 S.W.2d 18 (Mo. 1961) (en banc); *Grady v. American Optical Corp.*, 702 S.W.2d 911, 917 (Mo. Ct. App. 1985). A similar issue arises in cases in which defendant is alleging that the plaintiff is particularly susceptible. See *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (applying Iowa law).

230. See *infra* notes 231-37, 280-87 and accompanying text.

231. See generally Comment, *Duty to Warn and the Sophisticated User Defense in Products Liability*, 15 U. BALT. L. REV. 276, 285-307 (1986). For the defense perspective, see St. Leger, Goggin & Brophy, *supra* note 153, at 1268-76. For the plaintiff perspective, see Middleton & Shaffer, *The Intermediary Defense in Toxic Torts*, TRIAL, November 1986, at 66.

232. See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (retirement of so-called privity rule denying negligence cause of action between manufacturer and ultimate consumer).

"foreign-natural"<sup>233</sup> doctrine or "obvious danger"<sup>234</sup> rule<sup>235</sup> have not survived the modern rush by courts toward doctrinal simplification<sup>236</sup> and the creation, seemingly wherever possible, of a jury issue.<sup>237</sup> The supreme court's recent wholehearted endorsement of this approach argues against the adoption in Missouri of any new "per se" rules.

## VII. PROXIMATE CAUSATION

### A. *In General*

As the Missouri Supreme Court has stated, "Proving proximate causation in a strict liability case is a fundamental burden that must be met."<sup>238</sup> Clearly, the simple wording of Missouri's jury instruction, to the extent that plaintiff must prove that she "was damaged as a direct result of such defective condition"<sup>239</sup> of the product, fails to express the intricacies of modern products liability causation doctrine.<sup>240</sup> Specifically, the instruction fails to adequately take into account the complications that will arise when, for example, a plaintiff is unable to identify the particular product manufacturer that marketed the product in question, or where the defendant wishes to raise

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233. See, e.g., *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (Cal. 1936).

234. Also known as the patent-latent rule.

235. See, e.g., *Campo v. Scofield*, 276 A.D. 413, 95 N.Y.S.2d 610, 95 N.E.2d 802 (1950).

236. See, e.g., *Matthews v. Campbell Soup Co.*, 380 F. Supp. 1061 (S.D. Tex. 1974); *Betethia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W.2d 64 (1960) (removal of foreign-natural distinction); *Holm v. Sponco Mfg.*, 324 N.W.2d 207 (Minn. 1982) (abrogation of latent-patent rule). Needless to say, the mere abrogation of a "per se" rule such as the obvious danger doctrine does not stop that factual issue from arising in other contexts.

237. See, e.g., *McGowne v. Challenge-Cook Bros.*, 672 F.2d 652 (8th Cir. 1982) (obviousness of danger, while not a total bar to recovery, was relevant to the jury question as to plaintiff's contributory fault. Also holding that obvious and apparent danger instruction was an inappropriate converse to Missouri's instruction on defectiveness); see also *Hylton v. John Deere Co.*, 802 F.2d 1011, 1015 (8th Cir. 1986); *Grady v. American Optical Corp.*, 702 S.W.2d 911, 916 (Mo. Ct. App. 1985).

238. *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 381 (Mo. 1986) (en banc).

239. MAI 25.04, 25.05.

240. See, e.g., *Friedman v. General Motors Corp.*, 43 Ohio St. 2d 209, 216, 331 N.E.2d 702, 706 (1975) ("To sustain their allegations against [the defendants], the plaintiffs were required to prove that the [product], manufactured and sold by the defendant, was defective; that the defect existed at the time the product left the factory; and that the defect was the direct and proximate cause of the accident and injuries.") (citations omitted).

for jury consideration the issue of the causal role in the accident played either by the plaintiff or some third party.<sup>241</sup>

If Missouri continues to decrease the plaintiff's effective burden in proving that a product was defective unreasonably dangerous, then it is only to be expected that there will be a corresponding increase in defense interest in arguments based upon proximate causation.

### B. Occurrence of the Injury

Notwithstanding such complications, the occasional case will still nurture difficult questions of proof with regard to more mundane questions involving the exact circumstances surrounding the injury. Plaintiff retains the burden of proving that the defect that she has identified in the product<sup>242</sup> was the cause of the injury suffered.<sup>243</sup> Consider, for example, a case in which the plaintiff suffers a shock from an electric sign. The plaintiff's allegation is that the sign was in a "defective condition, unreasonably dangerous" due to a dearth of drain holes. Absent any evidence that there was water in the sign at the time of the injury, the question whether the alleged defect caused the injury should not be left to the jury.<sup>244</sup>

### C. Temporal Causation

Missouri has stayed loyal to the Restatement position that liability will not obtain unless the "[product] reach[ed] the user or consumer without

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241. For some additional proximate cause issues, specifically, of the *legal* cause variety, see Polelle, *The Foreseeability Concept and Strict Liability: The Odd Couple of Tort Law*, 8 RUT.-CAM. L. REV. 101, 119-25 (1976). See also Crankshaw v. Piedmont Driving Club, 115 Ga. App. 820, 156 S.E.2d 208 (1967); Oehler v. Davis, 223 Pa. Super. 333, 298 A.2d 895 (1972).

242. Either directly or through the utilization of circumstantial evidence. See *supra* text accompanying note 104.

243. For a close case involving accident reconstruction, see Boy v. I.T.T. Grinnell Corp., 150 Ariz. 526, \_\_\_, 724 P.2d 612, 614-15 (Ct. App. 1986). For the role of expert testimony, see Keller v. International Harvester Corp., 648 S.W.2d 584, 591-92 (Mo. Ct. App. 1983).

244. Garret v. Joseph Schlitz Brewing Co., 631 S.W.2d 652, 653-54 (Mo. Ct. App. 1982); see also Collins v. Goodrich Co., 558 F.2d 908, 912 (8th Cir. 1977); Tucker v. Central Hardware Co., 463 S.W.2d 537 (Mo. Ct. App. 1971); Lifritz v. Sears Roebuck & Co., 472 S.W.2d 28, 32 (Mo. Ct. App. 1971); Buckner v. Pillsbury Co., 661 S.W.2d 626 (Mo. Ct. App. 1983); Fahy v. Dresser Indus., No. 50783, (Mo. Ct. App. Jan. 27, 1987) (insufficient evidence that alleged defect in asphalt roller had caused injuries complained of); Bhagvandoss v. Beiersdorf, 723 S.W.2d 392 (Mo. 1987) (en banc); cf. Duke v. Gulf & W. Mfg. Co., 660 S.W.2d 404, 409 (Mo. Ct. App. 1983); Klein v. General Elec. Co., 714 S.W.2d 896, 900-01 (Mo. Ct. App. 1986).



substantial change in the condition in which it [was] sold.”<sup>245</sup> This provision relates to the proof of the existence of the factual defect<sup>246</sup> at a given point in time and the allocation of the burden on this issue to the plaintiff. As such it guarantees a minimum contact point between the alleged defect and the allegedly responsible defendant. The question whether or not a particular modification to a product was foreseeable should not be relevant to this threshold, and exclusively empirical, issue.<sup>247</sup> Rather, any question of foreseeable use should relate only to the legal defectiveness of the product.<sup>248</sup>

In manufacturing defect cases,<sup>249</sup> temporal causation issues will become inextricably intermingled with the problem of proving the existence of a factual defect in cases where the product in question was destroyed or badly damaged.<sup>250</sup>

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245. RESTATEMENT, *supra* note 19, § 402A(1)(b); *see, e.g.*, McIntyre v. Everest & Jennings, 575 F.2d 155, 157 (8th Cir. 1978); Lifritz v. Sears, Roebuck & Co., 472 S.W.2d 28, 32 (Mo. Ct. App. 1971); Winters v. Sears, Roebuck & Co., 554 S.W.2d 565, 569-71 (Mo. Ct. App. 1977); Weatherford v. H.K. Porter, 560 S.W.2d 31, 35 (Mo. Ct. App. 1977); Williams v. Deere & Co., 598 S.W.2d 609, 612-13 (Mo. Ct. App. 1980); Williams v. Nuckolls, 644 S.W.2d 670, 673-74 (Mo. Ct. App. 1982); Patterson v. Foster Forbes Glass Co., 674 S.W.2d 599, 605-06 (Mo. Ct. App. 1984) (Gaertner, P.J., concurring); Helm v. Pepsi-Cola Bottling Co. of St. Louis, 723 S.W.2d 465 (Mo. Ct. App. 1986).

246. Discussed *supra* text accompanying note 98.

247. *See, e.g.*, Hill v. General Motors Corp., 637 S.W.2d 382 (Mo. Ct. App. 1982) (defect caused by plaintiff modification to vehicle not present at time product left hands of manufacturer, therefore section 402A not applicable. Notwithstanding foreseeability of such modifications, defendant owed no duty to warn under negligence theory). *See generally* Cox v. General Motors, 514 S.W.2d 197 (Ky. 1974). *See also* Robinson v. Reed-Prentice, 49 N.Y.2d 471, 480, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 721 (1980) (“Principles of foreseeability, however, are inapposite where a third party affirmatively abuses a product by consciously bypassing built-in safety features.”)

248. The key to these types of cases is to determine the factual defect allegation that plaintiff is making. If that allegation is made by reference to the state of the product at the time of the injury producing event, then defendant may demand that plaintiff satisfies her temporal causation burden. Thus, the only issue would be the factual/empirical questions involved in comparing the product at the time of the injury with the product at the time of marketing. *See, e.g.*, Corsetti v. Stone, 396 Mass. 1, —, 483 N.E. 2d 793, 806 (1985). In contrast, if the plaintiff is making her factual defect allegation by reference to evidence as to the state of the product at the time of marketing, then (by definition) she will have demonstrated temporal causation. The more important issue that will arise in this type of case is whether plaintiff has made her burden with regard to showing reasonably foreseeable use of the product, in the sense that the misuse or subsequent alteration of the product could have been anticipated. *See, e.g.*, MacCuish v. Volkswagenwerk A.G., 22 Mass. Ct. App. 380, —, 494 N.E.2d 390, 394 (1986). The issue of foreseeable use is discussed *supra*, text at note 210.

249. Generally, this problem will not arise in design defect cases because, by definition, there will be other examples of the product to examine for the existence of defects.

250. *See, e.g.*, Coulter v. Michelin Tire Corp., 622 S.W.2d 421 (Mo. Ct. App.

D. *Avoidance of Injury*

The plaintiff's burden of proof extends beyond a mere showing that the product's identified defect was responsible for the plaintiff's injury. Additionally, plaintiff must show that the product, if rendered safer, would have avoided such injury. For example, in *Nesselrode v. Executive Beechcraft Inc.*,<sup>251</sup> the defendant argued, *inter alia*, that the inclusion of additional warnings in an aircraft repair manual would not have prevented the accident that occurred. This argument was based on evidence that mechanics had failed to read the manual in question. The Supreme Court of Missouri concluded that "the evidence was sufficient to allow a jury to infer that had [defendant] either affixed a warning to [the part of the aircraft involved], placed a warning in the . . . manual, or warned . . . by way of a service bulletin, [the aircraft owner] would have taken appropriate action. . . ."<sup>252</sup> Whereas some jurisdictions have adopted a specific modification to the burden of proof in such cases,<sup>253</sup> it cannot be said that the Missouri courts have resolved the matter.<sup>254</sup>

In *Racer v. Utterman*,<sup>255</sup> the Eastern District Court of Appeals stated that "[i]n failure-to-warn cases generally, certainty that the existence of the warning would have prevented the injury is not required. In the absence of compelling evidence establishing that the absence of a warning did not cause the injury the causation question becomes one for the jury."<sup>256</sup> However, in *Duke v. Gulf & Western Mfg. Co.*,<sup>257</sup> the Western District Court of Appeals stated, "that a rebuttable presumption must arise that a warning would be heeded."<sup>258</sup>

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1981); *Webster v. Empiregas Inc.*, 648 S.W.2d 198, 200 (Mo. Ct. App. 1983); *McClanahan v. Deere & Co.*, 648 S.W.2d 222 (Mo. Ct. App. 1983); *Fain v. GTE Sylvania*, 652 S.W.2d 163, 164-65 (Mo. Ct. App. 1983); *Patterson v. Foster Forbes Glass Co.*, 674 S.W.2d 599 (Mo. Ct. App. 1984); *Helm v. Pepsi-Cola Bottling Co.*, 723 S.W.2d 465 (Mo. Ct. App. 1986).

251. 707 S.W. 2d 371 (Mo. 1986) (en banc).

252. *Id.* at 385.

253. See, e.g., *Reyes v. Wyeth Labs.*, 498 F.2d 1264 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); *Magro v. Ragsdale Bros.*, 721 S.W.2d 832, 834 (Tex. 1986).

254. Cf. *Nesselrode*, 707 S.W. 2d at 392 (Donnelly, J., dissenting) ("While a presumption may exist that if a warning has been given, it will be heeded, that presumption cannot stand in the face of positive proof that the directions given were not heeded and that the parts' identifying numbers were not even noticed.").

255. 629 S.W.2d 387, 394 (Mo. Ct. App. 1981), *cert. denied and appeal dismissed sub nom.* *Racer v. Johnson & Johnson*, 459 U.S. 803 (1982).

256. Apparently approved of by the supreme court in *Jackson v. Ray Kruse Constr. Co.*, 708 S.W.2d 664, 668 (Mo. 1986) (en banc).

257. 660 S.W.2d 404, 419 (Mo. Ct. App. 1983); cf. *Grady v. American Optical Corp.*, 702 S.W.2d 911, 918 (Mo. Ct. App. 1985) (Eastern district apparently approving both *Racer* and *Duke*).

258. Apparently adopted in *Hill v. Air Shields*, 721 S.W.2d 112, 119 (Mo. Ct. App. 1986).

All that is certain, therefore, is that in cases alleging failure to warn<sup>259</sup> plaintiffs will face less difficulty in satisfying the courts on this aspect of the causation burden than in design or quality control cases.<sup>260</sup>

### E. Identifying the Defendant

The difficulties faced by plaintiffs in identifying a particular product manufacturer as potentially responsible for their injuries has been well illustrated by the DES<sup>261</sup> cases.<sup>262</sup> Responding to the inability of DES plaintiffs to identify the particular manufacturer (out of more than 300) actually responsible for the drug ingested by that particular plaintiff, many courts adopted the so called rule of market share liability developed by the California Supreme Court.<sup>263</sup>

In *Zafft v. Eli Lilly & Co.*, however, the Missouri Supreme Court refused to adopt the market share liability approach, labelling it as unfair, unwork-

259. See, e.g., *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851, 861 (8th Cir.), cert. denied, 423 U.S. 865 (1975); *McGowne v. Challenge-Cook Bros.*, 672 F.2d 652, 661-62 (8th Cir. 1982); *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949, 954 (8th Cir. 1982); *Grady v. American Optical Corp.*, 702 S.W.2d 911 (Mo. Ct. App. 1985).

260. See, e.g., *Fahy v. Dresser Indus.*, No. 50783 (Mo. Ct. App. Jan. 27, 1987) (insufficient evidence that if a deadman switch had been installed on asphalt roller, plaintiff's injuries would have been avoided).

261. Diethylstilbestrol; a synthetic estrogenic hormone first manufactured as a miscarriage preventative in 1947.

262. The DES cases, together with the asbestos cases discussed in the context of "state of the art," *supra* text accompanying note 149, furnish excellent examples of the "edge" of modern products liability doctrine. The fact that many jurisdictions have "developed" new doctrine to deal with the issues presented in those cases (e.g., market share, no "state of the art" defense) has prompted praise in some quarters for the ability of the common law to develop/demonstrate its flexibility and adaptability. Consider, for example, some of the issues raised in *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985) and cases and articles cited therein.

An alternative "world view" might point to the impotence of our redistributive systems to deal with the so-called mass disaster type injuries, such as DES, asbestosis, and the like. Rather than admit defeat, the courts have embarked on convoluted "band-aid" escapades in an attempt to redistribute these types of risks. In the case of DES injuries, our courts have introduced new products doctrine (e.g., the "market-share" theory considered *infra* text accompanying note 263) and perverted aspects of the intentional tort doctrine (e.g., *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978)). In the case of asbestosis, courts unwilling to extend products liability doctrine nevertheless may be tempted to redistribute such risks through other channels. See, e.g., *In re Asbestos Litigation*, 509 A.2d 1116 (Del. Super. Ct. 1986).

The problem with this doctrinal "stretching" is how to restrict it on a "case-by-case" basis without making the whole system look very silly. See, e.g., *Feldman v. Lederle Labs.*, 97 N.J. 429, —, 479 A.2d 374, 388 (1984).

263. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

able, and contrary to Missouri law, as well as unsound public policy.<sup>264</sup> Missouri has not been alone in resisting the market share approach.<sup>265</sup> Nevertheless, the court's rationale in *Zafft* is worthy of note:

This Court acknowledges and respects the compelling reasons motivating the trial court and courts of other states to resolve the dilemma presented in these cases by straining existing law or adopting novel theories. Plaintiffs are innocent and claim serious injuries alleged to result from their mothers' use of DES. Yet simply to state, as have courts ruling in favor of plaintiffs, that as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury, and that defendants can better absorb this cost, ignores strong countervailing considerations.<sup>266</sup>

In contrast, however, two years later in *Nesselrode v. Executive Beechcraft Inc.*, a similarly constituted court<sup>267</sup> was to espouse a quite radical rationale system of loss redistribution.<sup>268</sup> Nevertheless, there is no sign that *Zafft* will be reconsidered. Absent any such special assistance from adventurous doctrine, the plaintiff will have to continue to build her case from available evidence as to the identity of the manufacturer.<sup>269</sup>

#### F. Intervening Cause

A defendant will raise the issue of intervening (or superseding) causation in at least two situations.<sup>270</sup> First, it will arise where defendant wishes to emphasize before the jury the conduct of the plaintiff. Second, it will be present where the defendant wishes to urge jury consideration of the role of a third party. Under modern Missouri law, there is heightened defense interest in the supervening cause argument in these circumstances.

The reason for this is that Missouri effectively has denied the defense of other, arguably more appropriate, avenues by which to pursue these issues. For example, the defendant will have an interest in raising a supervening

264. 676 S.W.2d 241, 246 (Mo. 1984) (en banc).

265. See, e.g., *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); see also *Griffin v. Tenneco Resins*, 648 F. Supp. 964, 966 (W.D.N.C. 1986) (applying law of North Carolina) (describing proposed theories for recovery as, *inter alia*, "exotic").

266. 676 S.W.2d at 246 (citations omitted).

267. By 1986, Judge Robertson had replaced Judge Gunn.

268. 707 S.W.2d 371, 383 (Mo. 1986) (en banc).

269. See, e.g., *Patterson v. Foster Forbes Glass Co.*, 674 S.W.2d 599, 602 (Mo. Ct. App. 1984); *Helm v. Pepsi-Cola Bottling Co.*, 723 S.W.2d 465, 468 (Mo. Ct. App. 1986).

270. Compare those cases in which the defendant is alleging that he owes no duty to warn the plaintiff class, but only some intermediate distributor class in order to make the product reasonably safe. See, e.g., *Rusin v. Glendale Optical Co.*, 805 F.2d 650 (6th Cir. 1986).

This is in effect the "sophisticated user" argument dealt with *supra* note 231.

cause issue in situations where plaintiff’s conduct has not descended to sufficient depths to trigger application of the “contributory fault” affirmative defense.<sup>271</sup> Similarly, other than under the guise of a supervening cause argument, Missouri law does not permit the issue of an employer’s contribution of an employee’s product related injury to be litigated.<sup>272</sup>

Under Missouri law it is quite clear that “[t]he defendant is entitled to argue that the product contains sufficient safety devices so that it is not unreasonably dangerous *and also that the alleged defects did not cause the accident.*”<sup>273</sup> Furthermore, in *Nesselrode*, the Missouri Supreme Court acknowledged that “proximate cause has been recognized as a conceptual means of limiting the scope of liability in a strict tort liability action.”<sup>274</sup>

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271. Cf.. *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 493 (Mo. 1986) (en banc) (“the defendant may sometimes make use of the plaintiff’s alleged carelessness in support of arguments that the product is not unreasonably dangerous, or that the alleged defects did not cause the injury . . .”). Cf. H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36 (1987).

272. See *infra* text accompanying note 277; see also *Murphy v. L & J Press Corp.*, 558 F.2d 407, 411-12 (8th Cir. 1977) (reversible error in admitting workplace regulations because this had effect of transforming “feasibility” issue into “who had the duty to guard?” issue), *modified on other grounds*, 577 F.2d 27 (8th Cir.), *cert. denied*, 434 U.S. 1025 (1978); cf. *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1226-27 (8th Cir. 1981) (applying Minnesota law).

273. *Barnes v. Tools & Mach. Builders*, 715 S.W.2d 518, 522 (Mo. 1986) (en banc) (emphasis added); see also *Love v. Deere & Co.*, 684 S.W.2d 70, 75 (Mo. Ct. App. 1985) (defendant alleged that accident occurred, “not because of design defect, but because of amateur, home workshop repair.”).

274. 707 S.W.2d at 381.

For an example of the type of limiting instruction that is permitted in federal district court applying Missouri law, consider the following instruction which was permitted in *Chohlis v. Cessna Aircraft Co.*, 760 F.2d 901, 904 (8th Cir. 1985):

You are instructed that your verdict must be for defendant . . . if you believe that [the] airplane crashed, not because of any defective condition of the airplane, but because [the pilot] failed to follow the placard checklist and owner’s manual and failed to switch to his main gas tanks before landing, and ran his auxiliary tanks dry.

*Id.*

It should be noted, however, that the giving of such an instruction is probably conditioned upon accompanying it with an instruction to the effect that:

More than one person may be to blame for causing an injury. If you decide the defendant sold a dangerously defective product resulting in the death of [plaintiff], it is not a defense that some person that is not a party to this suit may also have been to blame.

*Id.*; cf. *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 493 (Mo. 1986) (en banc):

The defendant may sometimes make use of the plaintiff’s alleged carelessness in support of arguments that the product is not unreasonably dangerous, or that the alleged defects in a product did not cause the injury, *but these are traversing claims not appropriate for instruction.*

*Id.* (emphasis added)

The real problem with the superseding causation argument in modern products liability law is that "[i]n a strict tort liability case, proximate cause enters through a number of different doors. Underneath the conceptual umbrella of proximate cause can be found the concepts of misuse, abnormal use, reasonably anticipated use, and contributory fault."<sup>275</sup> The second problem with the supervening causation argument is "[u]nder established principles of causation, the proximate cause of an event or injury need only be a substantial factor or efficient causal agent."<sup>276</sup>

Consider a typical supervening cause case involving, for example, an employee injured at the work place allegedly because of the negligence of her employer, as well as because of the defendant manufacturer's defective unreasonably dangerous product. Plaintiff will object to the admissibility of evidence concerning the conduct of the employer in such a case on the basis of irrelevancy and prejudice.<sup>277</sup> However, since defendant is entitled to argue the issue of supervening cause to the jury, such evidence should be admitted.<sup>278</sup> Indeed, in some circumstances, such superseding cause evidence might be sufficient to sustain a directed verdict in favor of the defendant.<sup>279</sup>

#### G. *Intervening Cause and Foreseeable Use*

The main bar to any wider utilization of the principles of intervening causation in modern products law is the burgeoning scope of the foreseeable use doctrine.<sup>280</sup> The relationship between these two doctrinal constructs may be analogized to the relationship between two negligence concepts; the duty of care and proximate causation. Consider, for example, an accident in which a drunk driver crashes into a telephone booth occupied by the plaintiff. Plaintiff brings suit against the installers of the phone booth, alleging negligence in the choice of its location.<sup>281</sup> Defendants answer with a motion for summary judgment on the basis that, under the circumstances as alleged, defendants owed plaintiff no duty of care. If this motion is denied then, almost by definition, likewise are some of defendants potential intervening

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275. *Nesselrode*, 707 S.W. 2d at 381.

276. *Id.*

277. FED. R. EVID. 402 (relevancy); and *id.* 403 (prejudicial).

278. *See, e.g.*, *Gross v. Black & Decker (U.S.) Inc.*, 695 F.2d 858, 861-63 (5th Cir. 1983) (applying Texas law).

279. *See Kirsch v. Picker Int'l*, 753 F.2d. 670, 671-72 (8th Cir. 1985) (applying Missouri law; directed verdict for defendant X-ray machine manufacturer because failure to warn physician of attendant risks was not the proximate cause of the patient's injuries as physician already aware of those risks), *reh'g denied*, 760 F.2d 183 (8th Cir. 1985); *see also Strong v. E.I. duPont de Nemours Co.*, 667 F.2d 682, 688 (8th Cir. 1981) (applying Nebraska law).

280. *See supra* note 210 and accompanying text.

281. The hypothetical is based on *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal. 3d 49, 665 P.2d 957, 192 Cal. Rptr. 857 (1983).

cause arguments. For example, if the court was to hold that defendant owed such a duty with regard to the location of the phone booth, that should also serve to deal with any defense argument that the drunk driver colliding with the booth was an intervening cause. Thus, like a voracious character from some video game, the duty issue consumes the intervening cause issue.

A similar dynamic may be seen in the operation of the intervening cause and foreseeable use doctrines in products liability. Thus, if the court determines that, for example, an alteration of a product by a third party<sup>282</sup> or the misuse of the product by the plaintiff<sup>283</sup> was a foreseeable use,<sup>284</sup> no question of intervening cause may arise as a bar at a later stage.<sup>285</sup> As the court of appeals has stated in a case in which defendant sought to establish a chain of unanticipated use:

An intervening resulting cause is a new and independent force which so interrupts the chain of events initiated by defendant's negligence as to become the responsible, direct, proximate cause of the injury. The first cause becomes the remote cause and the intervening cause the proximate cause only when the chain of events is so broken that the result is no longer the natural and probable consequence of the primary cause or one which ought to have been anticipated.<sup>286</sup>

Furthermore, as the Eighth Circuit has concluded with regard to a warning allegation:

In this case the alleged intervening cause. . . was precisely the event against which [defendant] warned in its safety literature. It does not matter that the exact manner in which the [injury causing event] occurred was not foreseen. [Defendant] cannot argue that, as a matter of law, the precise danger which it contemplated was unforeseen.<sup>287</sup>

## VIII. CONCLUSION

Clearly, some trends in the recent development of Missouri products liability law are detectable. In general, it would appear that the supreme court has accepted the responsibility of determining the development of prod-

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282. See, e.g., *Duke v. Gulf & W. Mfg. Co.*, 660 S.W.2d 404, 414 (Mo. Ct. App. 1983).

283. See, e.g., *Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 836 (Mo. Ct. App. 1984).

284. In practice, of course, the court probably will content itself with a determination that the question of foreseeable use discloses a jury issue.

285. This remains true with regard to third party acts and omissions. However, H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36 (1987) does affect the situation where plaintiff is at fault.

286. *Love v. Deere & Co.*, 684 S.W.2d 70, 75 (Mo. Ct. App. 1985).

287. *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851, 862 (8th Cir. 1975).

ucts law. Missouri products liability law has not eschewed the doctrinal baseline provided for so many years by the Restatement (Second) of Torts. Rather the supreme court has set out to "purify" section 402A; to give section 402A what the court perceives as its full force as a strict liability doctrine.

The current attitudes displayed by the prevailing majority of the supreme court suggest that many issues previously left in the hands of the trial judge will, henceforth, be considered appropriate for jury determination.

To some, this in itself may reek of a pro plaintiff bias. However, it can hardly be considered revolutionary. Neither can it be considered particularly fashionable. Today, partly as a response to the insurance "crisis," much attention is being directed to the "re-doctrinalization" of tort law. The avowed purpose of this trend is to further consistency and predictability by providing the judiciary, once again, with the plethora of jury control devices that they once enjoyed.

In Missouri this trend, apparently accompanied by internal strife on the supreme court, has been ignored. Nevertheless, in matters that go beyond the core interpretation that should be placed on section 402A of the Restatement, the Missouri Supreme Court and its obedient appellate courts seem as conservative as ever in their responses. There has been no adoption of exotic doctrine.<sup>288</sup> Otherwise deserving plaintiffs will still face summary judgment when they are unable to identify the specific product supplier responsible for their injuries.<sup>289</sup> Successor corporations will be immune from liability based upon any "product-line" theory.<sup>290</sup> Products liability doctrine will not be permitted to trespass any further on the territory of the contract lawyers.<sup>291</sup>

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288. See *supra* note 265.

289. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (en banc).

290. *Young v. Fulton Iron Works Co.*, 709 S.W.2d 927, 940 (Mo. Ct. App. 1986). See generally Aylward & Aylward, *Successor Liability for Defective Products-Misplaced Responsibility*, 13 STETSON L. REV. 555 (1984); Schulman, *Commentary: Successor Corporation Liability and the Inadequacy of the Product Line Continuity Approach*, 31 WAYNE L. REV. 135 (1984). See also Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 CORNELL L. REV. 17 (1986).

291. See *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901, 903 (Mo. 1986) (en banc) (Welliver, J., concurring) ("when commercial parties of equal bargaining power enter into a contract which either expressly allocates the risk or by omission is allocated under the terms of the Uniform Commercial Code, the policy behind strict liability does not apply. Either the contract or the U.C.C. governs the allocation of risk.") (citation omitted); see also *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818 (8th Cir. 1983); *City of Clayton v. Grumman Emergency Prods.*, 576 F. Supp. 1122 (E.D. Mo. 1983); *Aronson's Men's Stores*, 632 S.W.2d 472 (Mo. 1982) (en banc). See generally Note, *Privity Revisited: Tort Recovery by a Commercial Buyer for a Defective Product's Self-Inflicted Damage*, 84 MICH. L. REV. 517 (1985).

Additionally, Missouri remains an unlikely candidate for any extension of strict liability into the landlord-tenant relationship. See, e.g., *Chubb Group of Ins.*



Missouri, and its supreme court, have remained true to the basic decision to redistribute most of the risks associated with defective products to the manufacturers of those products. This redistribution decision is in the process of reaffirmation by an often bitterly divided Missouri Supreme Court. Yet there is no revolution in progress. There has been no violent abandonment of the old approaches. This is particularly the case when recent and much maligned judicial developments are compared with reforms that now have emanated from elsewhere in the state capitol. If there is a criticism that can be levelled at the supreme court, it relates to a discernible over-eagerness to permit cases to go to the jury and an apparent disinterest in the administrative costs thereby imposed. It is ironic that Missouri's reform legislation, by apparently encouraging defendants to "try" the plaintiff's conduct in every case,<sup>292</sup> may have a similar impact.

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Cos. v. C.F. Murphy & Assocs., 656 S.W.2d 766 (Mo. Ct. App. 1983). Cf. Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985) (en banc). For an excellent discussion of the Becker case, see Note, *Let the Landlord Beware: California Imposes Strict Liability on Lessor of Rental Housing*, 51 Mo. LAW REV. 899 (1986). Of course, the situation will be different where a product is involved and the premises merely form a backdrop to the proceedings. See Gabbard v. Stephenson's Orchard, 565 S.W.2d 753 (Mo. Ct. App. 1978).

292. See, e.g., H.B. 700, 84th Gen. Ass., 1st Reg. Sess., § 36 (1987).